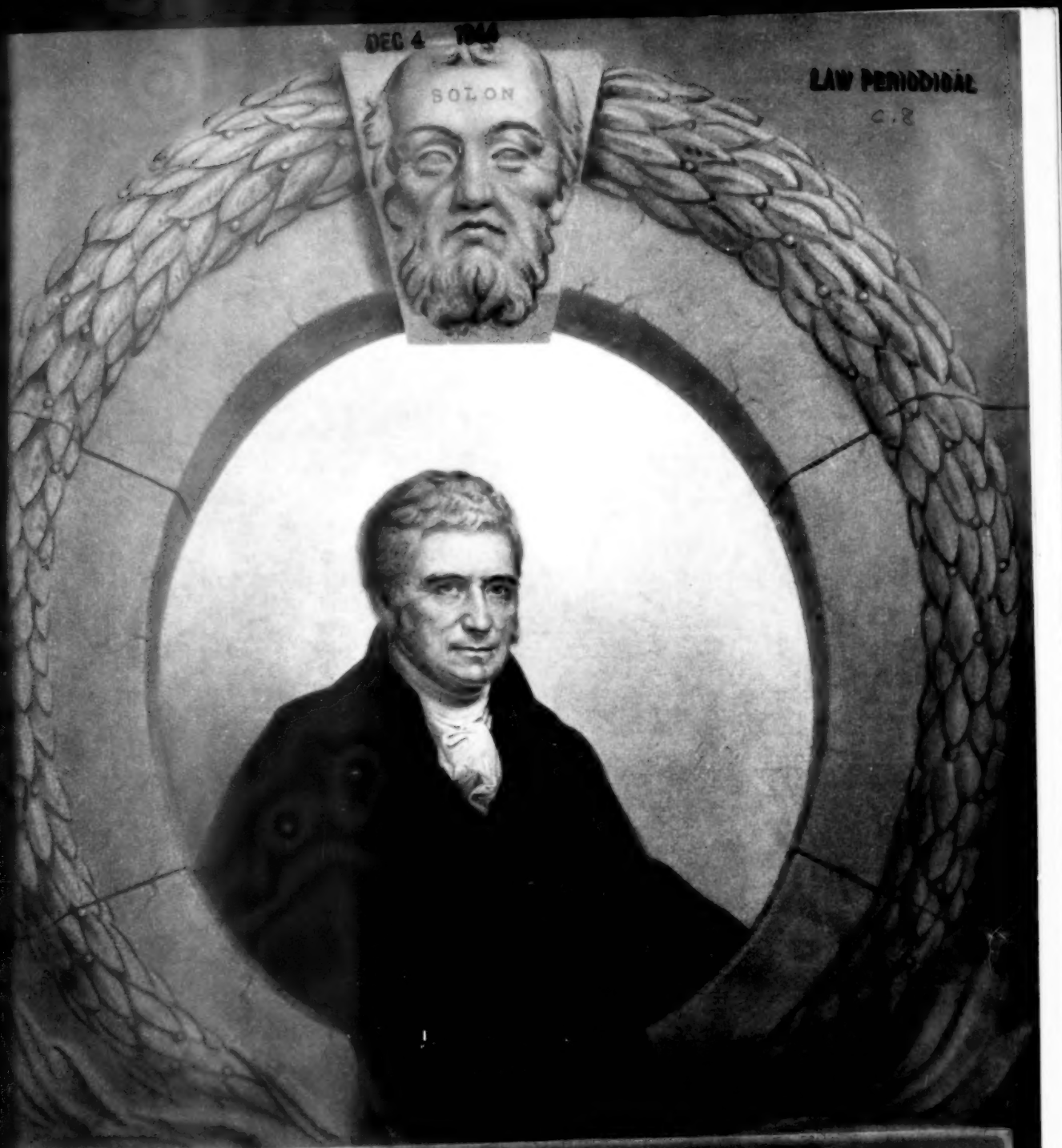


FIAT JUSTITIA

JOHN MARSHALL

AMERICAN BAR ASSOCIATION JOURNAL

June 1944

9:00 A.M. In seeking new business, this insurance agent explained to an attorney, that he could have quick and dependable service on Court bonds.

9:15 A.M. The attorney needs an attachment bond and must have it right away.

9:20 A.M. The agent telephones The Travelers Bond man, explains the situation and requests immediate action.

9:35 A.M. The attorney, the agent, The Travelers Bond man and the attorney's client are quickly brought together and the attorney makes sure that the necessary papers are properly signed.

9:45 A.M. The attorney expresses his appreciation for the satisfactory service rendered by the agent. "This is just the kind of service I need," he said, "and I'll call you whenever I need bonds."

10:00 A.M. The satisfied attorney files bond for approval.

A Travelers Bond Specialist in Your Territory Is Always Ready to Help You Secure New Business

THE TRAVELERS INDEMNITY COMPANY

HARTFORD, CONNECTICUT

TABLE OF CONTENTS

In this Issue IV

Current Events 329

Board of Governors Meeting 331

Chief Justice Hughes—American Law Institute . . 333

War and the Common Law 336
The Right Hon. Sir Wilfrid Arthur Greene, P.C.

International Law and the Monroe Doctrine Prize Winning Ross Essay 342
Willard Bunce Cowles

Mobilizing the Profession for Defense 350
Hon. Robert H. Jackson

Cartoon—"Divorces" 354

Book Reviews 355

International Constitutional Law 358
Amos J. Peaslee

Editorials 362

Current Procedural Objectives 364
Walter V. Schaefer

Review of Recent Supreme Court Decisions 366

Current Legal Periodicals 381

Hotel Arrangements—Indianapolis Meeting 383

London Letter 384

Ross Essay Competition 386

Proposed Referee-in-Bankruptcy Bill 387
Jacob I. Weinstein—Summary of Bill

Why I Approve the Referee-in-Bankruptcy Bill 388
Francis M. Shea

Why I Oppose the Referee-in-Bankruptcy Bill 390
Hon. Arthur J. Tuttle

Washington Letter 392

Bar Association News 394

Junior Bar Notes 396

Notice by Board of Elections 397

Nominating Petitions 398

IN THIS ISSUE

Our Cover—Chief Justice John Marshall, whose likeness adorns the June cover, has probably been the subject of more portrait painting than any other man in American history, excepting Washington. The portrait which we reproduce is the so-called "porthole" painting by Peale. It is interesting to know that a companion "porthole" portrait of Washington was also painted by Peale. The Marshall portrait hangs in the conference room of the Supreme Court Building in Washington. The Washington portrait hangs in the Vice-President's room in the Capitol Building. Through the kindness of Mr. Thomas J. Waggaman, Marshal of the Supreme Court of the United States, the JOURNAL's representative was enabled to secure a special photographic reproduction of the Peale portrait, from which our artist-photographer has made the cover design. We believe our members will appreciate the result.

The American Law Institute—Any lawyer who has had the good fortune to attend one of the meetings of the American Law Institute comes away feeling that a new interest, or professional hobby, has been added to his life. He begins to value more highly than ever what may be called the binocular approach to the law. By that figure of speech is meant the habit of viewing a legal problem through the right eye of practical experience, as well as the left eye of scholastic learning.

The memorable list of judges, lawyers and law school men who assemble for these meetings, in growing numbers, is an impressive indication of the place the Institute has come to hold in American Law and Jurisprudence.

We print in this issue two addresses of major interest which came out of the recent Institute meeting: 1) the address of the Chief Justice before the Institute; and 2) the address of the Attorney General at the breakfast meeting of the American Judicature Society. Each of these addresses is also made the subject of editorial comment.

International Law—The world, and particularly the American world, is a good deal pre-occupied today with the impact of the destructive Nazi ideology on law and justice, especially on international law. This fact is made clear by the well-written article, "International Constitutional Law," in this issue, by Amos J. Peaslee, of the New York City Bar.

Mr. Peaslee served in France as a major in the A.E.F., attached to General Pershing's headquarters. Later, he was associated with the American Commission to Negotiate Peace. Since the first world war he has practiced law in New York City. He is a well known writer on international law.

Referees in Bankruptcy—The long-existing controversy over whether referees in bankruptcy should continue to be paid on a fee basis or should be placed on a salary basis, has come to a clear-cut issue in the proposed Referee-in-Bankruptcy bill now pending in Congress.

This controversy is of interest to all members of the profession in the United States, whether they practice extensively in bankruptcy or not. Accordingly, the JOURNAL presents herewith a Symposium on the pending bill. The bill itself is summarized by Jacob I. Weinstein, of the Philadelphia Bar. The argument in favor of the bill is made by Francis M. Shea, now Assistant Attorney General, and formerly a member of the Attorney General's Bankruptcy Committee which was responsible for the formulation of the bill. The argument for the opposition is made by Hon. Arthur J. Tuttle, United States District Court Judge in Detroit. The Chairman of the ABA Section on Commercial Law, J. M. Niehaus, Jr., of Peoria, Illinois, advises the JOURNAL that the Section is vitally interested in the bill and would appreciate hearing from members of the Bar about it.

Better Law Writing—One of the basic reasons which impelled the late Judge Erskine M. Ross to set up the Ross Prize Essay Contest by the donation of $100,000 to the American Bar Association was to encourage original writing in what may be called the field of Jurisprudence. His gift was indeed a magnificent gesture in favor of better law writing. We print this month the prize-winning essay for 1941. An editorial and a special article in this issue both comment on the beneficial effects of the Ross Essay Contest.

The Master of the Rolls—For more than 400 years the office of Master of the Rolls has been one of the chief posts in the judicial system of England. The Bar of the United States has been complimented by the current visit of the present Master of the Rolls, The Right Honorable Sir Wilfrid Arthur Greene, P.C. The JOURNAL prints with much satisfaction in this issue his address delivered before the New York City Bar, "War and the Common Law." Its timeliness and significance during this month of June, in connection with the international affairs of our Government, can hardly be exaggerated.

Procedural Reform—The current article in this issue on procedural reform is largely devoted to the experience of Illinois in this important field of law. Professor Walter V. Schaefer, of Northwestern University Law School, who has written the article, is particularly well qualified to discuss this subject, because of his practical experience in this field.

Apologia—The June issue rounds out one year of work for the Managing Editor. It has been an engrossing, stimulating, and schooling year. Staunch support from his Board of Editors and a modicum of commendation from the Bar have been ample professional rewards. As for the resulting influence on the JOURNAL—*"Valeat Quantum, Valere Potest."*

AMERICAN BAR ASSOCIATION

JUNE, 1941 JOVRNAL VOL. 27, No. 6

CURRENT EVENTS

American Law Institute Meeting

THE NINETEENTH annual meeting of the American Law Institute was held at the Mayflower in Washington beginning Tuesday, May 6. Elsewhere in the Journal we print the address of Chief Justice Charles Evans Hughes before the members and guests of the Institute.

Following the address of the Chief Justice, William Draper Lewis reported that the Carnegie Corporation had made a further donation of $164,000, to enable the Institute to continue its present central organization, add to its editorial work on citations of the Restatement, complete the Restatement of the Law of Judgments, Real Property, Security, the Code of Evidence, and the Youth Correction Authority act.

The Director also reported the plans which have been undertaken to translate the Restatement of Anglo-American Common Law into Spanish and stated that this plan arose out of action taken by the American Scientific Congress and the Inter-American Bar Association.

Judge Goodrich's Report

Judge Herbert F. Goodrich of the Circuit Court of Appeals for the Third Circuit also submitted his annual report as Adviser on Professional Relations. Judge Goodrich referred to "an exceedingly interesting discussion" by Professor Arthur L. Goodhart, Professor of Jurisprudence, University College, Oxford, which appeared in a recent number of the U. of Pa. Law Review which was a discussion of the Restatement of the Law of Torts prepared by the Institute. On this point Judge Goodrich's report says:

> "Professor Goodhart points out that one might expect to find fundamental differences between the American and English law of Torts. . . . Social and economic conditions in England and America have shown striking contrasts. Turning from material factors to the spiritual influence 'such as the judges' prejudices and digestions to which such frequent references are made, the dissimilarity is equally obvious.' . . . Regardless of the reasons for differences, however, Professor Goodhart finds 'in no topic covered by the recent Restatement is there a major divergence between the English and the American law, and some of the minor differences are more apparent than real. It is a striking fact that a law student who studied the law of torts only in the American Restatement would have no difficulty in passing an English examination on this subject . . .'"

Judicial Citation of Restatement

In discussing the *reception* of the Restatement by the courts and by the Bar, Judge Goodrich's report says:

> "The greatest single tangible evidence of the significance of the Restatement is its reception by the courts of the country. We have compiled this list in tabular form by states and subjects, and that list is printed in full in this report."

The table shows that down to April 25, 1941, the Restatement has been cited 6,779 times. When we consider that only a year ago the total number of citations was around 4500 (as shown by the Annual Report of the Institute,) we realize the very commendable progress that the Restatement is making in this most important test of its utility and acceptance by the profession.

Letter from President Roosevelt

At the opening of the first session of the Institute meeting, Director William Draper Lewis read the following letter from President Franklin D. Roosevelt:

THE WHITE HOUSE
WASHINGTON

April 26, 1941

My dear Dr. Lewis:

In this critical period, the democracies are engaged in an endeavor to vindicate the reign of law and to sustain the supremacy of popular government. It is particularly vital, therefore, in the stress and strain of the world conflict, that orderly development of jurisprudence should not be neglected. The continuous process of adjusting and moulding the law to conform to the social needs of the times must proceed without undue interruption.

The past few years have marked outstanding advances in several branches of the law, especially in Federal civil and criminal procedure. Much more, however, still remains to be attained.

The American Law Institute has been making notable contributions to the progress of the law. On the occasion of its Nineteenth Annual Meeting it gives me great pleasure to felicitate the Institute on its past accomplishments, and to wish it success in its future endeavors.

Very sincerely yours,

(Signed) Franklin D. Roosevelt.

New Type of Bar Examination

The following item is taken from the Chicago Daily Law Bulletin. It discusses a topic of perennial interest to lawyers. At this particular examination and under the "new" method only 94 out of 500 applicants were given a passing mark.—Ed.

Boston, May 16—In Massachusetts, where a new type of bar examination is now being used, only 94 of the 500 men and women who took the February test will be recommended to the court, it was announced this week by William Harold Hitchcock, chairman of the Board of Bar Examiners.

The percentage of successful applicants was 18.8, believed to be the lowest in history with one exception about ten years ago. Many of those who took the examination were doing so for the second and third times.

Of the 94 to be recommended to the Superior court on June 18, ten are women. A total of 67 women took the examination.

The new type of bar examination which was begun in Massachusetts last year, is intended to test the ability to analyze a situation. The complicated record of a difficult case is presented to the candidate a month in advance. The questions he is asked in the examination have to do with his ability to dissect problems and put their elements together in a logical whole. This is supplemented by an oral examination so that always the examiners interview the candidate.

Commenting on the results of the examination, the Boston Herald asserted that while the examinations today are of a different type from those used up to last year, "it appears that qualified applicants do about equally well under either system."

Rules for Admission to the Bar

THE JOURNAL is recently in receipt of a 200 page booklet, "Rules for Admission to the Bar, in the several States and Territories of the United States, in force March 1, 1941," published "with the compliments" of West Publishing Co., St. Paul, Minn. The United States Supreme Court, and Federal Courts' rules are of course included. The "general requirements" are given rather than the formal recitals, providing for examination and admission. Reference is made in each instance to the publication in which the particular set of rules are set forth in full. The booklet also includes considerable information about statutes, reports and digests, in the several states which is helpful to a lawyer opening a new office. Copies of the pamphlet may be secured from the publisher.

Additional Law List Approved

The special Committee on Law Lists announces the approval of the 1941 Edition of the Canadian Credit Men's Legal Directory, and of the July, 1941 and January, 1942 Editions of The General Bar.

STANLEY B. HOUCK
Chairman

Minneapolis Regional Conference

ON MAY 21 state and local officers and officers-elect of the Bar Associations of Wisconsin, Iowa, North Dakota, South Dakota and Minnesota met in Minneapolis with members of the ABA House of Delegates, representatives and members of the National Committee on Judicial Administration, the Committee on National Defense, and the American Citizenship Committee of the ABA. The Regional Conference was a part of the program of co-operation between state and local bar associations which has been such an effective and successful movement in the American Bar Association under the leadership of President Jacob M. Lashly.

Burt J. Thompson, of Iowa, Chairman of the ABA Section on Bar Organization Activities, presided, assisted by Carl B. Rix, of Milwaukee, member of the ABA Board of Governors for the Seventh Judicial Circuit, and Thomas J. Guthrie, of Des Moines, member of the ABA Board of Governors for the Eighth Judicial Circuit.

The program was marked by important business and social functions. The topics discussed were: National Defense; Unauthorized Practice; Survey of State Bar Associations; Community Law Libraries; Bar Integration; Law Office Organization; and other items. The evening was set aside for an informal banquet, at which the speaker was William Doll, of Milwaukee, President of the Wisconsin Bar Association.

Detroit Regional Conference

THE Seventh Regional ABA Conference was held at Detroit in 1941. The States represented were Illinois, Indiana, Kentucky, Ohio, and Michigan.

The program announces that the major topics for discussion were: Judicial Administration; National Defense; American Citizenship.

The presiding officers as shown by the printed program, were: Burt J. Thompson, Chairman, ABA Section on Bar Organization Activities; Carl V. Essery, of the Detroit Bar, member of ABA Board of Governors for the Sixth Judicial Circuit; and Carl B. Rix, of the Wisconsin Bar, member of the ABA Board of Governors for the Seventh Judicial Circuit.

Among the principal speakers on the program were: George E. Brand, author of "Unauthorized Practice Decisions," who spoke on that topic; Lawrence C. Spieth, of the Cleveland Bar, member of the ABA Committee on National Defense, who spoke on that topic; Hon. Frank Drake, of Louisville, who spoke on "Post-Admission Legal Education." Addresses also were made by Hon. John J. Parker, Justice of the Circuit Court of Appeals, Fourth Judicial Circuit, who spoke on "Judicial Administration," and President Jacob M. Lashly, who spoke on "Responsibility of the Bar in a Changing World."

In the evening a banquet was held in conjunction with the annual dinner of the Detroit Bar Association and the State Bar of Michigan.

May Meeting of Board of Governors

THE annual spring meeting of the Board of Governors of the Association was held at the Mayflower Hotel, Washington, D. C., on May 5, 6, 7 and 8. In opening the meeting, President Lashly reported to the Board on his activities since the last session held at Chicago in March. He directed particular attention to the first annual conference of the Inter-American Bar Association at Havana, Cuba, at which a number of members of the Board were present. President Lashly's excellent address before that conference appeared in the May issue of the Journal. The appointment of James Oliver Murdock of Washington, D. C., as the representative on the Council of the Inter-American Bar Association was confirmed.

Continuing his report, the President referred to numerous state and regional Bar Association meetings attended by him during the past two months. At all of these meetings, he stated, great interest was manifested in the work of the Association's special committee on National Defense and the special committee on Improving the Administration of Justice.

The Committee of Judges appointed to determine the Ross Essay Award reported to the Board, through its Chairman, former President William L. Ransom, of New York. Dean J. A. McClain of Washington University Law School, St. Louis, another member of the Committee, was also present. The third member of the Committee, Mr. Justice William O. Douglas, of the United States Supreme Court, was unable to attend because of the Supreme Court being in session. Judge Ransom advised the Board that fifty essays were submitted this year, many of which were of exceptionally high quality, but that the three members of the Committee were unanimous in their selection of the winning essay which was submitted by Willard Bunce Cowles, of Washington, D. C. The Board thereupon voted the award to Mr. Cowles and, in view of the timeliness of his discussion with respect to the current international situation, requested the Board of Editors of the Journal to publish it prior to the next annual meeting. Mr. Cowles' essay appears elsewhere in this issue.

Acting upon the request of Dean Lloyd K. Garrison, of Wisconsin, that he be relieved of his duties as a member of the Board of Editors of the American Bar Association Journal, the Board of Governors accepted his resignation and, upon the recommendation of the Board of Editors, elected Reginald Heber Smith, of Boston, to fill the vacancy thus created.

Information as to the status of the various administrative law bills now pending in Congress was given to the Board by Chairman O. R. McGuire of the Association's Committee on Administrative Law. He reported that hearings are now being conducted with respect to such legislation before the subcommittee of the Senate Judiciary Committee. Further information with respect to this subject appeared in the May issue of the JOURNAL.

One of the most important items on the Board's agenda was the report of the special Committee on National Defense, which was presented by the Chairman of the Committee, Edmund Ruffin Beckwith, of New York. In an inspiring and thought-provoking statement as to current and possible future activities of his Committee, Mr. Beckwith emphasized the necessity for expansion of the Committee's work and the need for additional funds and personnel. He expressed deep appreciation of the splendid cooperation which has been given him by both the Army and the Navy and urged that all possible support be given to this, one of the Association's greatest undertakings in the public interest. In response to an invitation from that body, Mr. Beckwith also addressed the American Law Institute on the work of his Committee.

Reacting to the intense interest and enthusiasm manifested by the Committee Chairman and to the obvious importance of the work being done in this critical period, the Board pledged its full cooperation in supporting the Committee's activities. Of principal concern at this time is the problem of providing adequate appropriations to finance the expanding activities of the National Defense work. The Board was informed by Chairman Howard L. Barkdull of Ohio, of the special Committee on Ways and Means, that the organization of his Committee's work is nearing completion and that the Committee is hopeful of securing sufficient sustaining memberships to provide the additional funds so necessary to the continuance of the work of the Committee on National Defense and the Committee on Improving the Administration of Justice headed by Judge John J. Parker.

In connection with the foregoing matters, the Board also adopted a resolution proposed by one of its members, George L. Buist, of South Carolina, creating a special committee of three members of the Association, to be appointed by the President, to be known as the Committee on War Problems. Under the resolution, this Committee is directed to study continuously during the period of its existence the effect of war economy upon the activities of the Association and to stand ready from time to time to advise the Board of Governors and the House of Delegates as to the most desirable methods of adjusting the activities of the Association to the conditions created by war. The Committee, however, is to receive no appropriation for its expenses and is to make no formal reports.

One subject which precipitated extended discussion did not appear on the Board's agenda. This was the appeal to the Bar for assistance in

putting our law of national defense in order, which was contained in the stirring address of Attorney General Robert H. Jackson before the American Judicature Society. This notable address, which is printed in full elsewhere in this issue, page 350, is a challenge to the Bar to go into the matters discussed by the Attorney General and study them. Copies were furnished to all members of the Board following the address. The extended discussion thereof by the Board was not occasioned by any reluctance to respond to the appeal but by a diversity of views as to the methods by which such assistance could be rendered. The following resolution was finally adopted: "RESOLVED, that the President of the American Bar Association be and hereby is authorized to appoint a committee or committees consisting of such number of members as he deems suitable, to assist him in advancing and coordinating the work of the American Bar Association in national defense, and to cooperate with the Department of Justice in the advancement of national defense."

Thereafter, President Lashly, pursuant to the authority contained in the foregoing resolution, appointed the following as members of the special committee on Advancement and Coordination of National Defense: Thomas D. Thacher, New York City, Chairman; Walter P. Armstrong, Memphis, Tennessee, Chairman of the Committee on Jurisprudence and Law Reform; Edmund R. Beckwith, New York City, Chairman of the Committee on National Defense; George I. Haight, Chicago, Illinois, Chairman of the Committee on Bill of Rights; William D. Mitchell, New York City; David A. Simmons, Houston, Texas, President of the American Judicature Society; Philip J. Wickser, Buffalo, New York, member of the Board of Governors; Grenville Clark, New York City, and the President ex-officio.

In addition to the foregoing matters, much of the Board's time and attention was occupied with consideration of arrangements and program for the coming annual meeting of the Association at Indianapolis in September, with the financial problems of the Association, and with administrative problems generally. The next meeting of the Board will be held at Indianapolis on Saturday, September 27, preceding the opening of the annual meeting, subject to earlier call of the President.

JOSEPH D. STECHER
Assistant Secretary

DO IT NOW

THE NATIONAL DEFENSE Program sponsored by the American Bar Association deserves the support of every loyal member of the Bar, and the cooperation of the membership is earnestly solicited in bringing this activity to the attention of fellow members of the Bar not presently enrolled in the Association.

By having a non-member fill out and return the attached form, you will be doing your part in this most important work. A remittance of $8.00 with the application ($4.00 if the applicant was admitted to the bar in 1936 or subsequent thereto) will cover the dues to June 30, 1942.

AMERICAN BAR ASSOCIATION
1140 North Dearborn Street, Chicago, Illinois

Date and place of birth.....
Original admission to practice.....
State Year
Other states in which admitted to practice (if any).....
Bar Associations to which applicant belongs.....
.....
White ☐ Indian ☐ Mongolian ☐ Negro ☐
Name .....
Office Address .....
Street City State
Home Address .....
Street City State
Endorsed by .....Address .....
Check to the order of American Bar Association for $.....is attached.

CHIEF JUSTICE HUGHES BEFORE THE AMERICAN LAW INSTITUTE

Opening Remarks of President George Wharton Pepper, introducing the Chief Justice:

"I welcome you to the 19th Annual Meeting of the American Law Institute. We assemble in obedience to the impulse which prompts us in days of excited utterance to do our little best to keep the boat from rocking. With divergent convictions respecting national policy; with varying emotions respecting the course of events abroad, I am sure we all agree that it is never more important to emphasize the place of law in life than in days when law is widely proclaimed as a cowardly restraint on virile action and when a passion for justice is flouted as nothing but unworthy weakness.

In such a posture of events, we are fortunate indeed to have as our Guest of Honor this morning the public officer whom we recognize as the personification of Justice and the embodiment of Law. We pray that for many years his broad shoulders may bear the heavy responsibilities of the greatest office in the gift of our Republic and that the judicial ermine may never be draped on shoulders less adequate than his.

Fellow citizens: I give place to the Chief Justice of the United States."

CHIEF JUSTICE HUGHES said:

We are finishing this week the hearing of arguments for this Term. Because of the vacancy due to the retirement in February of Mr. Justice McReynolds, we have had a Court of eight judges and, naturally enough, there have been several cases in which there has been an equal division and these have been set down for reargument before a full Court. Despite this vacancy, we have thus far (as of May 3d) disposed of 28 more cases than during the corresponding period of last Term. The total number disposed of stands at 820, of which there have been 254 on the merits and 566 on petitions for certiorari. The corresponding total a year ago was 792. There has been an increase of 45 cases on our docket, but this increase has not embarrassed the work of the Court and, save for the reargurments made necessary, we expect to end the Term by disposing of all cases ready to be heard.

Notable Advance in Procedure Reform

I am happy to be able to point to another notable advance in promoting procedure reform. By the Act of Congress of June 29, 1940, the Supreme Court was authorized to prescribe rules of practice in all proceedings prior to verdict, or finding of guilty or not guilty when a jury has been waived, in criminal cases in the federal courts. We have already promulgated rules, under an earlier Act, as to procedure on criminal appeals. In discharging this new and extremely important duty, the Court has adopted the same method which was followed with such conspicuous success in the drafting of Rules of Civil Procedure. We have appointed an Advisory Committee composed of distinguished professors of law, who have specialized in the study of criminal procedure, and eminent practitioners from different parts of the country. This Committee, with Arthur T. Vanderbilt as Chairman, Professor James J. Robinson as Reporter, and Alexander Holtzoff as Secretary, has already organized and has entered upon its task with promptness and zeal. It is probable that the Committee will be able to have before it tentative drafts in the early Fall. Thus, under the authority of Congress, we are making a frontal attack all along the line on procedural survivals unsuited to our time and are seeking to sweep away the unjustified technicalities and opportunities for dilatory tactics which have obstructed the administration of justice in the federal courts.

In the present undertaking, the Committee will have the great advantage of having before it the compendious Code of Criminal Procedure drafted by your body, and I wish now, on behalf of the Committee and of the Court, to acknowledge our indebtedness to your labors in this field.

Administrative Office United States Courts

A year ago I had something to say to you of the Administrative Office of the United States Courts. This new enterprise has now been thoroughly organized and its promise is being admirably fulfilled under the effective leadership of the Director, Henry P. Chandler, ably supported by the Assistant Director, Elmore Whitehurst, and the Chief of the Division of Procedural Studies and Statistics, Will Shafroth. I cannot too highly commend the intelligence and skill they have shown in making effective this new instrument of service. Of course, a large part of its work has to do with the Business Administration of the Federal Courts—formerly handled by the Department of Justice, and it is a pleasure to observe the satisfactory manner in which these matters of budgets, personnel, facilities and supplies have been dealt with. These involve a host of details of which the public knows little, but upon which depend the smoothness and adequacy of the mechanism of judicial administration. Outstanding in these services to the courts has been attention to the convenient arrangement and equipment of quarters,—the Administrative Office acting as an intermediary with other governmental authorities in order satisfactorily to meet the needs and desires of the judges. With this goes the survey of law libraries and the endeavor, so far as appropriations will permit, to correct deficiencies and equalize facilities. Then there is the introduction into the clerical offices, to the extent found to be prac-

ticable, of modern office devices and the simplifying of clerical and accounting procedures.

Value of Administrative Information

While the new system was intended to be of aid in these matters of apparatus, the chief objective was to promote promptness and efficiency in the disposition of litigation. One of the necessary steps to this end is to obtain an adequate understanding of the course of administration by perfecting a system of statistics so that they will be really informative and not a mere mass of figures which through lack of proper analysis are either meaningless or of slight value. Great progress has been made by the Administrative Office in this matter. Those of you who have had occasion to examine the statistical tables presented by the Director in his reports will see how intelligently and painstakingly this difficult task has been performed.

It is highly important that we should not merely have a record of apparent delays but should know the reasons for them. Thus it appears from the information obtained for the first year of the Administrative Office, that inability of the courts to hear cases on account of congestion was responsible for the delay in only about one-sixth of the civil cases which had been at issue more than six months and in only about one-tenth of the criminal cases pending more than that length of time. The Judicial Councils in each Circuit, consisting of the Circuit Judges, are periodically advised of cases held under advisement by district courts for considerable periods and any known reasons for the delay and similar information is given with respect to cases pending before masters. The plan for giving this information tends to promote promptness and at the same time enables the Judicial Councils through their good offices to secure expedition.

The quarterly reports made by the Director to the Judicial Councils show where there is congestion or where particular difficulties exist and thus facilitate measures, either within the Circuit or by designation of judges from outside, to afford necessary relief. The Administrative Office has been of great assistance in canvassing the work of the district courts and in learning just what judges are most available for such designations as the Chief Justice is authorized to make in accordance with the statute.

Cooperation between the judges and the Administrative Office has been aided by the visit of representatives of that office to various courts. Calendar systems have been the subject of special study and the distribution of information showing the success of particular procedures cannot fail to be helpful. In a similar way the details of successful administration in particular districts in the selection of jurors have been communicated to other districts. In short, the Administrative Office is a clearing house for the examination of techniques and the exchange of assembled data.

Notable interest has been taken in the pre-trial procedure available under the Civil Rules. Inquiries are now in progress as to its use, and the results of its use, in various districts. It appears that this method has resulted in certain instances in conspicuous gain by reducing arrearages, and judges in other districts have been keen to ascertain the experience of those who have tried it.

Probation Officers

One of the most important duties of the Administrative Office relates to the investigation of the qualifications of those proposed for appointment as probation officers. The power of appointment lies with the district judges, but it is their practice to submit applications to the Administrative Office for investigation. It cannot be too strongly emphasized that the system of probation depends upon the character and aptitude of the probation officers. On June 30, 1940, there was an average case load of 148 cases per officer, and although that average has been somewhat reduced by the appointment of additional officers, it is still far too high. The Judicial Conference of Senior Circuit Judges was so impressed with the importance of securing probation officers of outstanding competence that they took special note of this situation at their October meeting. In view of the responsibility and volume of the work of the probation officers they declared it to be the sense of the Conference that they "should be appointed solely on the basis of merit without regard to political considerations, and that training, experience and traits of character appropriate to the specialized work of a probation officer should in every instance be deemed essential qualifications." I am glad to say that the Director advises me that the appointments of probation officers during the calender year have been excellent.

Judicial Conferences

The development of the Administrative Office has greatly enlarged the responsibilities of the Judicial Conference of Senior Circuit Judges. The Director, while appointed by the Supreme Court, is placed by the law under the supervision and direction of the Judicial Conference. This has required, both this year and last year, a special session of the Judicial Conference in January when the budget for the courts and other important matters were examined. The Director is in direct communication with the Senior Circuit Judges whenever necessary and the Conference has an Advisory Committee with which the Director may consult.

At the last meeting of the Judicial Conference in January, the report of the Attorney General's Committee on Bankruptcy Administration was examined. That committee made an exhaustive examination and an admirable report which in its main features was approved by the Judicial Conference. There was thus recommended and approved the creation of a Division of Bankruptcy in the Administrative Office. That Division is to provide the periodical and frequent examination of the affairs of referees and other bankruptcy officals, the collection of bankruptcy statistics, the imme-

diate and continuing investigation of rules and practices, and the receipt and investigation of complaints. The Judicial Conference resolved that the fee system for the pay of referees in bankruptcy should be abolished and a system of full-time referees at fixed salaries, as recommended by the Attorney General's Committee, should be adopted for the country at large in so far as such a system may be justified by local conditions; further, that a nation-wide survey should be conducted by the Director of the Administrative Office with a view of determining whether or not such system is practicable in all districts and areas of the country, and, if not, to what extent it should be supplemented by part-time referees on a salary basis. There were many other important recommendations in relation to bankruptcy administration which I have not time to state, much less to review. These are now under consideration by the Congress.

Youth Correction Authority Act

In connection with these progressive movements, I should not fail to mention the important model Youth Correction Authority Act which was adopted by your body last year, relating to the treatment of convicted youth of the older adolescent age. Dr. Lewis informs me that committees have been formed to adjust the Act to local conditions and that bills have been introduced into the legislatures of several States. This is justly described as "the most important constructive suggestion for dealing with the crime problem that has been made since the original probation and juvenile court legislation."

So we steadily advance in perfecting machinery and improving opportunity. Still, in every department of administration it is the human factor that counts most. The community looks to our judges for competency, efficiency and impartiality, without which codes merely add to an accumulation of legal futilities. Competency, meaning learning in the law and trained skill in its application; efficiency, meaning the avoidance of waste motion, the bringing of litigation to its essential points and promptness in decision; impartiality, which means that the scales of justice are not weighted by prejudice or favor. It is the privilege and duty of the judiciary to demonstrate the capacity of democratic government to have the peoples' laws administered without "an evil eye and an unequal hand." The community also looks to the administrative agencies, which are multiplied in response to social needs, for competency, efficiency and impartiality in their respective spheres. So far as they exercise the prerogative of hearing and deciding controversies under legal authority, albeit with their own appropriate technique and flexibility, they must commend themselves by exhibiting essential judicial virtues.

Crusaders in Upholding the Law

In this sphere of judicial activity, we are not crusaders save as we are zealous in upholding the majesty of the law and are keenly intent upon the hearing and deciding of controversies between man and man, and between government and citizen, according to the law and not with any ulterior policy or purpose. Democracy cannot escape its pressure groups. Each interest has its imperious demands. These groups compete in the market place, in the forums of public opinion, in popular elections, and in our legislative halls, but they have no place in the halls of judicial administration.

The lamps of justice are dimmed or have wholly gone out in many parts of the earth, but these lights are still shining brightly here. We are engaged in harnessing our national power for the defense of our way of life. But that way is worthwhile only because it is the pathway of the just. It is our high privilege, although our task may seem prosaic, to strengthen the defenses of democracy by commending to public confidence and esteem the working of the institutions of justice in both state and nation.

"LETTER TO THE ALUMNI"

[*Excerpt from a stimulating letter recently sent out by Dean Albert J. Harno, of the Law School of the University of Illinois. Ed.*]

"THE LEGAL profession appears to have come to a fork in the road it is traveling and some of its members, a choice few, are anxiously reading the signs to determine which branch it should take. Some law teachers are also trying to read the signs. The lawyer, it seems, can travel one fork, which is but a continuation of the road on which he has come thus far, without much difficulty; but if he takes the other he must prepare himself with new and better equipment. No one can fully foresee the consequences of this decision, but it is likely to have a highly significant bearing on the future welfare and usefulness of the profession.

For generations lawyers have been brought to maturity on a "verbal nutriment" which has been administered in the belief, as Charles A. Beard has expressed it, that the mastery of law "was to be attained mainly by a study of the words of lawgivers." This, in fact, has been the substance on which lawyers have been educated in the schools and in the profession. This training has prepared them well to deal with strictly legal questions, to advise clients on their legal rights, and to litigate these rights in court. One phase of the decision that lies before the profession today is whether it will keep on traveling down that road; whether it will be satisfied to perform those functions and nothing more; whether, indeed, it wishes to choose that assignment as its sole future rôle, even though its acceptance, in a changing environment, may result in relegating the lawyer to a comparatively insignificant place in the social matrix."

WAR AND THE COMMON LAW*

By THE RIGHT HON. SIR WILFRID ARTHUR GREENE, P.C.
Master of the Rolls

IN ACCEPTING your generous invitation to deliver this address, I may perhaps regard myself not as an individual but as the representative of my brethren of our bench, and of my old colleagues of our bar. They are here in spirit with me. They, as well as I, are honoured by the great compliment which has been paid to me, and by the generous and hospitable welcome that I have received. It was in token of this that I was requested by the Lord Chancellor, as head of our Judiciary, himself an honorary member of the American Bar Association and of the New York State Bar Association, and by our Attorney General, as leader of the English Bar, to convey to you the cordial greetings which I have just read. Today such messages have a profound and moving significance.

Visits by the Two Bars

It has been the practice of the members of the legal profession in our two countries in the past from time to time to visit one another. At these visits, new friendships have been made and old friendships renewed; and by them that devotion to free institutions and the common law which we share has been fostered and strengthened by personal contact and the interplay of ideas. From these meetings, we on our side have drawn inestimable benefits and fresh inspirations; and I make bold to think that the same is true of you. I have not so far had the good fortune to take part in those meetings in your country since exigencies beyond my control have prevented me. But I shall always cherish the pleasantest memories of the visit paid to us by the American Bar Association in the year 1924. That visit we all hope will be repeated when a happier day dawns. And when it comes about, it will surely have a deeper meaning than ever existed before, since it will celebrate the triumph of the rule of law in human affairs and of the great principles of justice and freedom of which the common law is both the strong foundation and the sure defense. Of that law, we as lawyers are the humble but devoted servitors; and it will surely be fitting that in the hour of liberation, we should celebrate together a victory which will be preeminently our victory. For it will be the victory, in a world-wide contest, of the principles to which, in a smaller forum, our lives have been devoted.

Responsibilities of the Present

But I feel that in this grave hour there rests upon my shoulders a responsibility even greater than that which I have described. It is not merely my colleagues of today who share the honour you have paid me, and whose greetings I bring to you. Is it too great a presumption on my part to feel that I represent, however unworthily, the great spirits of the past whose work and whose glory in establishing the supremacy of the law are the common heritage of your country and of mine? They now see their handiwork assailed by a tyranny more formidable and more barbarous than that which they so resolutely and so successfully opposed. I wish that the task of speaking for them had fallen to one more worthy than myself. But if devotion to the causes and the principles for which they laboured, and a determination to shrink from no sacrifice to maintain them will suffice, those qualities I can at least claim to possess, as they are possessed by each one of my countrymen and by each citizen of our commonwealth of nations, which like your own country, has shared the blessings and maintained the traditions of the common law.

Debt to Blackstone

One more qualification I can claim to possess. In the great library of All Souls College in the University of Oxford there stands the statue of one of its greatest fellows. Blackstone's name is revered in your country as much as in my own and no one among English lawyers had a greater influence in presenting to you the doctrines of the common law. Of that great college I too have the honour to be a fellow and under the shadow of that statue I pursued my early studies in the law. As a symbol of the debt which the United States owes to Blackstone a statue of him was presented to us by the American Bar Association to commemorate its visit to England in the year 1924. It stands in the great hall of the Royal Courts of Justice, a fitting symbol of the bond of the common law that unites us and a defiance to the enemy.

Aspects of Present Struggle

There are many aspects from which the present struggle can be regarded. There is none which brings out more clearly the fundamental issues at stake, than the legal aspect. Let me have your patience for a few moments while I set this matter before you as it appears to me. Those institutions, those freedoms which give dignity and security to the manner of life which your people, as well as ours, have built up for themselves are founded on law and by the law safeguarded. It is only where law prevails that freedom can exist. An incorruptible and independent judiciary, a fearless and high-principled bar, a system of law which is equal for all

*Address at the Association of the Bar of the City of New York, May 16, 1941; under the Auspices of the American Bar Association, the New York State Bar Association and the Association of the Bar of the City of New York.

men, which embodies the wisdom and experience of the past but is always ready to adapt itself to the needs of the present, a system which reflects the moral and social sense of the people—that is the picture which I like to have before me of the legal framework of our lives, a framework built by the great common lawyers and equity judges of the past, by Coke, and Holt, by Blackstone, and Eldon, and Mansfield in England and by Marshall, and by Kent, Story and Oliver Wendell Holmes in the United States. The achievement of this ideal is only made possible by the establishment of certain fundamental principles upon which our liberty is built. Those principles govern the relations of citizen and citizen and they govern the relations of the citizen and the State. As between citizen and citizen they are directed to ensuring that all men are equal before the law, that no man is to be oppressed by fear of his neighbor and that the pledged word shall be fulfilled. As between the citizen and the State their object is to secure that the State as much as the private citizen shall obey the law, that the private citizen can live his life without fear of tyranny from above; and that the first loyalty that he owes is to the law approved by the majority of his fellow-citizens in accordance with the free and democratic institutions under which he lives. No better summary of the conception of the law which we share with you can be found than in the language of the judicial oath taken by a judge of the Supreme Court of Judicature when appointed to the Bench in England. As some of you may not know it, I will read it to you as I took it myself. "I swear that I will well and truly serve our Sovereign Lord King George the Sixth in the office of Master of the Rolls and I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will." Here in a few simple words is to be found the very essence of this matter. And it is upon the observance of this oath that the life of the citizen and the security of his person, his property and his rights depend.

Freedom from Fear

In one of those inspiring addresses which your President has made to the American people he referred to the Freedoms the defence of which is vital to the life of the nation. One of those which he mentioned was freedom from fear. This was a profound saying. Fear is incompatible with liberty, it is incompatible with justice; where it overshadows the life of men no dignity of the mind, no elevation of the soul can be attained. Man becomes degraded to the level of the beaten animal that trembles at the sight of the whip and cowers before its master. To rule by fear is the manner of tyrants—"Let them hate me so long as they fear me" has been their cry throughout human history; and wherever they have been victorious night has descended upon the human race.

We who have inherited the great principles of the Common Law are entitled to claim that for peoples who love freedom, the Common Law is the most potent legal instrument ever made for securing that honest men may live their lives undisturbed by fear. Fear of our neighbor, fear of oppression by the State, fear of every kind of injustice and tyranny is averted from our lives so long as the supremacy of the Law is resolutely maintained. Secure in the freedom of our institutions and protected by the impartiality of the law, we can without fear enjoy those other freedoms of the mind and of the spirit that adorn and elevate the human race.

The Lawyer's View

This is our way of life as we lawyers see it; upon these principles the order of our existence is based, and in their formulation and enforcement lawyers have played a noble part. Cast your minds back to the time when my country was suffering from the tyranny of the Tudor Kings. There within the domestic limits of Great Britain a war was waged against oppression and injustice. It was pre-eminently a lawyer's war; for it was the struggle of the Common Law against its antithesis, the caprice and tyranny of an autocratic ruler. More persons speak of those great constitutional documents, the Petition of Right, the Habeas Corpus Act, the Bill of Rights and the Act of Settlement than have ever read them. Those who set themselves to struggle against tyranny in whatever form it appears will find inspiration in the grave and forceful language in which they are expressed. There is found in the catalogue of tyrannical actions against which they were directed and in the remedies which they provided, time and again, the statement that these actions are contrary to the law, and that for their prevention the law must be obeyed.

Influence of the Common Law

The spirit of the Common Law and its insistence upon personal liberty is the joint possession of your country and of mine as it is of the whole British Commonwealth of Nations. Although in that Commonwealth many different systems of domestic law are to be found, those systems have been permeated by the spirit of the Common Law and have been administered by judges enlightened by its ideals.

The principles of domestic law which we uphold have their counterpart in our attitude towards the law of nations. The right of all nations small and great to live their lives and develop their institutions in freedom, without the fear of tyranny and ill-treatment by any other nation, the sanctity of contracts made between nations, these are the foundations of our practice. Without the observance of law and decent conduct as between nations, nothing but fear and uncertainty can rule the world; and just as fear degrades an individual, so it degrades a nation and paralyses every attempt to secure the happiness and prosperity of its people.

It is for these reasons that I ask you to view the struggle upon which we are engaged as one between the nations who inherit the traditions and principles of the Common Law and the nations to whom those traditions

and principles are the very opposite of the tyranny which they are seeking to impose upon the world. In saying this I do not forget our allies whose systems of law are different to our own. But we are struggling to maintain on their behalf those great principles which run through the Common Law, the equality of one man with another, the observance of the law and the banishment of fear from human life. It is for them to make use of their freedom once they are set free, and if I am asked what my war aims are, I will say: They are to free a hundred million slaves and to save from slavery many hundred millions more. Is not that a cause worth dying for?

Common Law Principles Flouted by Our Enemy

This struggle is indeed the struggle of the common lawyers in the 17th century writ large. We are opposed to nations who in their practice at home and in their relations to other peoples flout and deride every principle for which the Common Law stands. At home they have introduced the rule of fear—that is the only rule that prevails. The courts of so-called justice, far from administering an equal law for all men, have become mere instruments of the executive government. The judges, slaves as they are, do what they are told to do, and grant or deny justice according to the orders of their masters. The secret police are above the law. Men and women are thrown into concentration camps upon the word of an informer and there left to linger and die in circumstances of the most savage brutality. The State is supreme, it is above the law and no man can tell where and how the blow will fall upon him. The individual owes no duty to the law but only to the arbitrary orders of the State. The State owes no duty to the individual save the abhorrent duty to teach him how to trample on its neighbours. No advocate dares defend a prisoner whom the government is determined to destroy. The fearlessness and independence of the bar which, with you as with us, insures that the meanest prisoner accused of the most detestable crime, even treason against the State, shall have his case properly presented so that he shall only be convicted in accordance with the law, are not to be found among them. Just think for a moment what the lives of our peoples would be if all the safeguards which the law affords them were suddenly removed. We take these safeguards for granted, since we cannot imagine life without them. But am I wrong in thinking that if they were taken away from us our lives would be degraded by fear and our souls now proud and unafraid, would become the souls of slaves? Believe me the rubber truncheon and the firing squad are poor substitutes for justice.

Enemy Flouts Law of Nations

In the affairs of nations the picture is the same. Tyrants are consistent and run true to type. If you wish to know how a tyrant nation will treat its neighbors if it feels strong enough to do so, look at its attitude towards domestic law and you will find the answer. If it denies justice to its subjects, if it rules them by fear, if it places the State above the law, you will find without a possibility of doubt that wherever an advantage is to be gained by breach of faith, by intimidations and by brutality uncontrolled by any regard for the souls and bodies of men, that opportunity will be seized. The whole careers of the dictators are just a repulsive story of contracts made in order to give a false sense of security, of treachery unashamed, of complete disregard of all those rules which, even in the cruelty of war, civilized nations have by agreement imposed upon themselves, of fear employed as an instrument of policy to induce their neighbours to surrender into slavery. This method is not some up-to-date invention; it is as old as the human race. The tragedy of our time is that modern invention has placed in the hands of such nations weapons a thousandfold more terrible and effective than were known to the barbarians of old. How many nations have in the course of this war been lulled to sleep by promises never intended to be kept and then subdued by fear of the horrors of mechanized warfare and aerial bombardment?

No country in which the supremacy of the law is maintained can do these things. Freedom under just and equal laws at home is incompatible with such treacherous and brutal conduct towards other nations. The aggressor subdues in order to enslave. The free nation that fights to defend itself cannot bring itself to enslave its adversary when he is defeated.

Liberty in Full Circle

With you as with us liberty in full circle and not in some small segment of our lives is what we have striven for and what we have won. It is what we are determined to maintain and hand down to our children as our fathers handed it down to us. The spirit of it pervades our thoughts and our actions. That liberty was won for us as much by lawyers as by statesmen or by fighting men. It was the lawyers who saw with a clear eye the implications of despotism as it affected the whole life of the people, it was they who formulated the rules by which it could be kept in check. It was the Common Law of England that formed the charter of our liberties, and any violation of it which was attempted was in the end broken by it. He who breaks the law will be broken by the law—so it has always been in our history as well as in yours. Let us lawyers be worthy of the traditions which we have inherited.

Statesmen and the Common Law

But the part played by the Common Law in resisting tyranny and oppression was not played only by the lawyers. The statesmen who took part in those struggles, both with you and with us, were bred in its spirit and inspired by its doctrines. The rights which they claimed and for which they fought were expressed in its language. To that test were brought all the claims of despotism and by that test they were rejected. Let me

quote to you two passages, one of which I have already quoted elsewhere. In the Petition of Right, prepared by that great common lawyer Sir Edward Coke in the year 1627, the third year of the reign of King Charles the First, appear many noble passages relating to the Common Law. Let me take on recital, it is this:

"And whereas also by the Statute called the Great Charter of the liberties of England, it is declared and enacted that no freeman may be taken or imprisoned or be disseised of his freehold or liberties or his free customs or be outlawed or exiled or in any manner destroyed, but by the lawfull judgment of his peeres or by the law of the land."

And now let me cross to your side of the Atlantic and read an extract from the Declaration of Rights of the Continental Congress in the year 1774:

"Whereupon the deputies so appointed being now assembled in a full and free representation of these colonies, taking into their most serious consideration the best means of attaining the ends aforesaid, do in the first place, as Englishmen, their ancestors, in like cases usually have done, for asserting and vindicating their rights and liberties declare. . . . 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law." Noble words these. Let us pay heed to them.

Independence Hall

A day or two ago I visited Independence Hall at Philadelphia. In that historic building events took place which secured freedom and happiness to countless millions of human beings, events which to the far-seeing eye of history have proved to be as important for the preservation of our liberties as they were for the winning of your own. I was profoundly moved by what I saw and what I felt for I saw there the spirit of liberty, liberty under the law and liberty to make the law; but with the stern compulsion to obey the law laid upon all men alike and upon the State itself.

Such reflections to a lawyer brought up in the love of free institutions would be deeply affecting at any time. But at this moment they filled me with a greater emotion, for it is all the things of which that building is the symbol that now stand in deadly peril. The slavery which would be fastened upon the necks of men if we were to fail in this struggle would be the negation of everything for which that building stands.

Common Law and the Spirit of Defiance

This is a time when the people of my country in their sufferings, their anxieties and their perils are brought close to the heart of fundamental things. The comfort of the individual, his wealth, his life itself, have gone into the background. Our eyes are fixed with grim resolution but unclouded vision on something which transcends them all, the preservation of everything that is noblest in man. In the formation of the spirit which defies these dangers and unflinchingly endures these sufferings, I claim without fear of contradiction that the Common Law of England has played a most important part. This is known to lawyers—who better can penetrate beneath the surface of things and see the great principles that underlie them? But it is known also in their hearts by the humblest of my countrymen incapable though they may be of expressing it in words. They are all imbued with the spirit of the law, their actions and their feelings are all guided by it, often no doubt unconsciously, but they know in their hearts that it is the maintenance of law for which they are struggling and that failure will mean the loss of all that they hold precious, loss not merely for themselves but for all mankind. No one of our people is prepared for the sake of life to lose those things which make life worth living, and it is in the law that those things find their symbol and their protection.

Tenacity of the Common Law

It is a proof of the tenacity of the Common Law and of the deep rooted love of free institutions which characterises our people that in the imminent perils of war we have preserved in every essential particular those great achievements of democracy. Every act of Parliament that is passed is passed by the free vote of the representatives of the people. Every regulation affecting the lives of the people which is made is made under statutory powers conferred by act of Parliament duly passed; when made, it is subject to the vigilant criticism of the representatives of the people and its operation is carefully watched and debated in Parliament.

The Courts continue to sit and administer the law of the land in the same way, in the same places at the same times as before; and apart from such special provisions as may come into force in case of invasion, they will continue to do so. Nothing that the enemy can do shall interfere with the administration of justice. If all the law courts were destroyed, we should sit in cellars, if the cellars were destroyed we should sit under the trees. We shall not, I hope, be reduced to these inconveniences, but whatever happens our work will continue along with all the other work of the nation. The Law of the land prevails, and although the necessities of the hour have called for a greater discipline of our people, that discipline has been imposed by Parliament and the courts will not allow it to be extended one inch beyond what Parliament has sanctioned. Those measures of discipline are no more than what all thoughtful and right-minded persons would voluntarily impose upon themselves. But the harm that can be done in modern war by even a small group of foolish or ill-willed people is so great and may be so fatal that they must be compelled to fall into line with the overwhelming majority of their fellow-subjects. Such is the will of the people. Is this Democracy or is it not? To my mind it is Democracy at its best, democracy rising to a great and perilous occasion but remaining democracy still.

War-Time Legislation

This is not the time to give you details of our war-time legislation. But I will refer to three matters which illustrate what I have said. Two days before the outbreak of war a set of important Regulations made under the Emergency Powers Act was issued by the Government. They were framed in wide and comprehensive language which was submitted to severe criticism in the House of Commons. It is not to be thought for a moment that the Government was seeking by these Regulations to impose some form of intolerable despotism upon us. The members of that Government were as democratic as you or I and they made these proposals in perfect good faith. Their object undoubtedly was to have their powers framed in wide language so as to enable them to act swiftly and effectively for the protection of the State in all the unforeseeable situations which might arise. But the House of Commons, ever vigilant to preserve our liberties, was unwilling to sanction the grant of powers of the necessity for which they were not convinced. As a result the Regulations were withdrawn and a new set made in which the provisions in question were radically modified. Is this Democracy or is it not?

Martial Law

The next point relates to martial law. You will remember that one of the things which led to the Petition of Right was the issue by the King of Commissions for proceeding by martial law, "By pretext whereof"—I quote the actual words—"some of your Majesty's subjects have been by some of the said Commissioners put to death, when and where, if by the laws and statutes of the land they had deserved death, by the same laws and statutes also they might and by no other ought to have been judged and executed." This detestation of martial law has descended to us by the unseen channels of tradition and is as strong today as it was three hundred years ago. Accordingly, the original Emergency Powers Act forbade the making of regulations for trial of civilians by martial law. Even in the areas disturbed by an actual or attempted invasion the special provisions which have been made for the administration of justice in that event enact that trials of civilians must take place before a judge with two civil magistrates as his assessors. Is this Democracy or is it not?

Services and Property at Disposal of the King

The last illustration takes me to the month of May last year. Holland and Belgium had been overrun in a brutal and treacherous attack. The French front had been broken and the British forces were in imminent danger of encirclement and destruction. We were confronted by the greatest disaster to the allied arms and by imminent and unprecedented danger to the security of our own country. At this supreme moment in our history the elected representatives of our people passed an Act of Parliament under which the King was empowered by order in Council to make provision "for requiring persons to place themselves, their services and their property at the disposal of His Majesty." To those who passed through the gravity of that hour these simple words have a significance which can never be recaptured in the cold pages of history. I will quote a sentence which I have used elsewhere for it expresses my thought better than any other words can do:

> "In those words we expressed all our courage and all our resolution: and we flung them in the face of the enemy."

Is this Democracy or is it not?

Inspiration of the Common Law

In all these matters the spirit of the Common Law has been at work inspiring our actions and insuring the maintenance of the principles for which it stands. I have no patience with those who assert that a democracy can only go to war by ceasing to be a democracy. There is no particle of truth in this statement, and if you desire proof of this, cast your eyes across the sea and study what has happened in my country. Do not listen to any grumbling which you may hear there. The right to grumble is one of the rights of a free nation. The grumblers are few and misguided. Listen rather to the opinions of the vast majority of sober-minded and determined persons and you will find that they think as I do.

Then again I have heard it said that the discipline which we have voluntarily imposed upon ourselves will continue to restrict our liberties after the war is over. Those who say this have little confidence in the spirit of freedom that animates our people. They are poor lovers of liberty who will allow the restrictions accepted in a time of emergency to continue after the emergency has passed. In the last war we imposed upon ourselves similar restrictions. The present legislation is little more than the adaptation of those restrictions to the novel and surprising circumstances of this war. As soon as the last war was over those restrictions disappeared and the same will happen when this war is won.

Are you and we worse men than our fathers? Does the love of freedom burn less fiercely in our hearts? Are we to fold our hands and say that freedom is dead in any case and that nothing we can do can save it? Surely we should be unworthy of the tradition handed down to us by our ancestors who struggled for the victory of the Common Law and were not discouraged even in the darkest hour.

Moral Aspects of the Struggle

In what I have said I have tried to put before you one of the moral aspects of this struggle—that aspect which is concerned with law. We believe ourselves to be fighting for the maintenance, not only in our country but in all the world of free people, of those moral values which raise man above the level of the brutes. One of those values is the law and it is not the least important. For it is the law which makes possible the enjoyment of those other values, and it is significant that one of the first steps taken by the dictators in their

own countries was to poison and befoul the fountain of justice.

The existence of these moral forces is one of the strongest weapons in our hands. When you are comparing the strength of two adversaries, do not look only to numbers and armaments, do not let your mind be disturbed by the result of this battle or the loss of that territory. These things are important, in some circumstances they are decisive. But remember to look at the moral issues and the spirit that animates the two combatants. There are those who express doubts as to the victory of the British Empire. They have not been to my country and they are ignorant of the spirit which maintains its people in their perils and doubles and redoubles the strength of their hands. They have not seen the exploits of our airmen who, outnumbered five and often twenty to one drove the aerial armadas of the enemy from the skies in the autumn of last year. I saw this superb achievement, I saw the Germans come in by the hundreds, I saw them driven back in confusion day after day by a handful of gallant men, I saw them come crashing to the ground in flames. What right has anyone to say that we may be defeated who has not seen these things? I assert—and no one of my countrymen who know the facts would contradict me—that it has been the knowledge that we are fighting for the greatest things in life which has given us and will continue to give us the unconquerable strength and resolution which we have. These moral values of which regard for the law forms so important a part are worth in war many armies, as the future will show.

Confidence in Future

It is for these reasons that I survey the future with confidence. I am not blind to the tribulations which lie ahead of us. But the qualities which I have mentioned and the moral fervour which inspires us will give us strength to endure them. We are a united people. And what of the enemy? At home they enjoy no freedom, the inestimable benefits of an ordered and decent life under the protection of a just and equal law, fearlessly and impartially administered, are denied to them. Belief in their own material strength and unthinking fanaticism are the only things which they have to unite and inspire them. Abroad they have placed their foot upon the necks of a hundred million men and women and more, all of whom, with the exception of a few degraded individuals, hate them with a bitter hatred. The edifice which they are seeking to build is based on no foundation and has no moral order or spiritual conviction to support it.

I have put before you as I see them some of the vital aspects of this struggle. Through the whole picture runs the spirit of the Common Law on our side and its antithesis on the side of the enemy. That spirit you prize as highly as we do; and it would be your loss as well as ours if the conditions in which it can flourish were to be destroyed. Make no mistake, it is that spirit which the aggressors have set themselves to destroy wherever it is found, to destroy by force or fraud, by conquest or by treacherous and stealthy approach preparatory to a final spring upon the intended victims. Every citadel of freedom—and how few are left?—will be sapped and undermined, every method of dividing and confusing its defenders will be employed. Against these subtle and crafty tactics nothing but continuous vigilance and preparedness will suffice, and all that can be hoped for at the best by those not yet attacked, is an uneasy and armed peace. If we win, as with your help we are bound to win, the destruction of this evil thing will be effected and the rule of law will once more prevail. Were we to lose, and with your help we shall not lose, Hitler's new order would be fastened on the world, as he himself has said, for 1,000 years. The Dark Ages would have come again. This new order means nothing more nor less than that the political and economic organization of the world shall be laid out under the domination of Germany, and what is more, that no enslaved state will ever be able to rise to freedom again. The days when ploughshares could be hammered into swords and an oppressed population could rise and drive out its conqueror, have passed. Nowadays it needs aeroplanes and tanks and machine guns and warships, and the most sinister thing in this new order is that the world is to be so organized that no subject country will ever be able to make for itself these weapons without which it could never hope to set itself free.

That would be a world in which there would be no place for lawyers such as you and me, since the law which we are proud to serve would have vanished from the earth. Be fanatics for freedom and the law; give us all the help to defend them, which you feel able to give, and that quickly. They are surely precious things.

"INVENTION OF GREAT MEN"

"The fact that in all the professions there is one first favorite means no more than the fact that there is only one editor of the London Times. It is not the man who is singular, but the position. The public imagination demands a best man everywhere, and if nature does not supply him, the public invents him. The art of humbug is the art of getting invented in this way. For example, there died a short time ago a barrister who once acquired extraordinary celebrity as an Old Bailey advocate, especially in murder cases. When he was at his zenith I read all his most famous defenses and can certify that he always missed the strong point in his client's case and the weak one in the case for the prosecution, and was in short the most homicidally incompetent impostor that ever bullied a witness or made a moving but useless appeal to a jury. Fortunately for him, the murderers were too stupid to see this; besides, their imaginations were powerfully impressed with the number of clients of his who were hanged, so they always engaged him and added to his fame by getting hanged themselves in due course."—*Fortnightly Review*

INTERNATIONAL LAW AND THE MONROE DOCTRINE*

[Prize Winning Ross Essay]

By WILLARD BUNCE COWLES

Special Assistant to the Attorney General

THE PRESENT world situation is bringing about a realization among the American states that the normally applicable rules of neutrality and nonintervention are inadequate to cope with existing conditions. Under the leadership of the United States, they are taking the position that the principle of self-defense is applicable. This principle, which underlies the whole international system and is more fundamental than normally applicable principles and rules of international law, may be invoked when the peace and security of a state is threatened by the action of another.[1] Under such circumstances, the menaced state may take extraordinary defensive measures, limited only by their reasonableness in the light of existing conditions or those to be anticipated. Precedents, particularizing and implementing this rule of reason, are now developing in the Western Hemisphere.

I

Declaration of Panamá

In the Declaration of Panamá (September 1939) the Inter-American Consultative Meeting declared that the American states, as neutrals, had an inherent right to have the waters adjacent to the American continent kept free from hostile acts "as a measure of continental self-protection."[2]

Security Zone

The Declaration defined the limits of a Security Zone, stipulated that the American states will consult on measures for its observance whenever they consider it necessary, and provided for patrolling the area, if deemed necessary. The following recommendations of the Inter-American Neutrality Committee (April 27, 1940),[3] on the effects of the institution of the Zone, were accepted at the Habana Consultative Meeting (July 1940):[4] The Zone areas are not to be regarded as territorial waters, but open sea; belligerent activities should not be undertaken within the Zone; measures of self-defense are not proscribed there nor are belligerent operations begun outside the Zone and continued within it, provided they are continuous; and the American states should adopt regulations to prevent contacts of merchant vessels in their ports with belligerent warships; a belligerent should not be penalized merely on the ground of being the aggressor nation in the war, inasmuch as all belligerents have a right to use the high seas for peaceful purposes and to defend themselves from attack; penalties should be imposed on the local aggressor in the Zone, that is, against the belligerent which initiated hostile acts there. It was further recommended in the case of a violation of the Zone, that the American governments: Should make a joint investigation to decide which belligerent was the local aggressor; in the light of the determined facts, make a collective protest to the Government whose warship is believed to have initiated the action; deny admission to their ports of the warship or aircraft deemed guilty of such viola-

*The full title for papers submitted in the Ross Essay contest was, "Prospective Development of International Law in the Western Hemisphere, as Affected by the Monroe Doctrine." See editorial in this issue of the JOURNAL on the Ross Essay contest.

The opinions expressed herein represent the personal views of the writer and are not necessarily reflective of the views or attitudes of any agency of the Federal Government. This Essay was submitted February 15, 1941.

1. The universality and supremacy of the principle of self-defense in international practice was demonstrated recently by numerous reservations made to the Treaty for the Renunciation of War (Kellogg Pact). For texts see Department of State Publication No. 468.

2. Final Act, Department of State Bulletin, Oct. 7, 1939, pp. 321, 332.

3. For text of the recommendation see 35 American Journal of International Law (Supp.) 38-43 (hereinafter cited A.J.I.L.). The Neutrality Committee, created by the Panamá Consultative Meeting, consists of seven experts in international law, charged with studying problems of neutrality in the light of experience and changing circumstances and formulating recommendations. Department of State Bulletin, Oct. 7, 1939, pp. 326-328.

4. Final Act, Department of State Bulletin, Aug. 24, 1940, pp. 127, 129.

tion, or all warships of that belligerent.

After the *Graf Spee* incident (December 1939) the American states jointly protested to the belligerent governments for "violating" the Zone and threatened to prevent belligerent vessels from using American ports if they committed further hostile acts in the Zone.[5] The belligerents (Great Britain, France, and Germany), taking the position that they were not bound by the Declaration of Panamá, pointed out that it had not received such general assent as to modify the existing laws of neutrality which, in their opinion, had not been violated.[6]

Effect of Declaration

The Inter-American Neutrality Committee reached the conclusion that general consent to the Declaration was not necessary. Its legal justification of the Zone is a remarkable document. It is a mixture of the law of neutrality, self-defense, and the Treaty for the Renunciation of War (Kellogg Pact), involving two interpretations of aggression—an aggressor government, and aggressive action in any specific case within the Zone. The Committee's reasoning is having a decided influence on the current implementing of the principle of self-defense.[7]

In considering this document it may be recalled that the Kellogg Pact condemns recourse to war for the solution of international controversies and renounces it as an instrument of national policy, except in case of self-defense.[8] Moreover, under customary international law, belligerents can carry on hostilities on the high seas but not in territorial waters; and the principle of self-defense can be applied on the high seas in time of peace.[9]

Legal Reasoning of Declaration

The legal reasoning of the Neutrality Committee proceeds as follows: An aggressor under the Kellogg Pact has no right to make war anywhere; it has no more right to wage it on the high seas than on land; the high seas are however open to all vessels (including those of an aggressor country) for peaceful purposes, but not to make war, except in self-defense; neutral interests are paramount to belligerent interests by "inherent right" implied from the principle of self-defense and from the renunciation of war; the neutral can accordingly treat a belligerent unit on or over the high seas, within a reasonable distance from its shores, as a trespasser if it initiates hostilities, and the neutral can use reasonable force to prevent belligerent activities there which might affect its peace or the peaceful pursuit of its commerce.

This is new doctrine. Its effect on the development of the law remains to be seen. Hemispheric implementation of the principle of self-defense is veering toward penalizing the Axis powers as aggressor governments. The enforcement of the Security Zone now seems to be in abeyance and the recommended sanctions may possibly be applied against the Axis governments.

II

The hemispheric stage is set for several other developments on the basis of self-defense. Diplomatic and consular privileges may be curtailed in relation to political activities; European possessions in the Western Hemisphere may be jointly administered by the American governments; the property of nationals of the Axis powers in this hemisphere may be "frozen"; European vessels in American ports may be taken over under an interpretation of the right of angary; and the other American states may follow the policy of the United States, as expressed in the Lend-Lease Bill.[10] These trends all point in the direction of a forceful implementation of the principle of self-defense. This principle, currently being restated, grows out of a concern similar to that which gave rise to the Monroe Doctrine, and may be applied on a world-wide basis by the American states under United States leadership.

Fifth Columnists and Diplomatic Immunities

The Consultative Meetings at Panamá and Habana passed resolutions concerning foreign subversive activities tending to jeopardize democratic institutions.[11] As an apparent result of the Nazi diplomatic incident in Uruguay, the Habana Meeting recommended that the American governments adopt legislation and administrative regulations for the effective prohibition of "every" political activity by foreign persons "no matter what form they use to disguise or cloak such activity."[12] If the American governments are to attempt to prohibit every political activity of diplomats and consuls by legislation and regulation, we may expect to see some carefully drawn documents defining the limits, on the basis of self-defense, of diplomatic and consular functions and privileges. Perhaps a rule of reasonableness will be developed respecting the number of such officers which will be received by any American government.

European Possessions and Self-Defense

At the Habana Meeting the American states asserted

5. Department of State Bulletin, Dec. 23, 1939, p. 723.
6. *Id.*, Feb. 24, 1940, pp. 199-205.
7. The Habana Consultative Meeting (1940) recommended that the American states adopt the principles and rules contained in the Neutrality Committee's report in their local legislation. (Final Act, Department of State Bulletin, Aug. 24, 1940, pp. 127, 129.) Both the Senate Committee on Foreign Relations and the House Committee on Foreign Affairs, in reporting favorably on the Lend-Lease Bill, justified its international legality on the principle of self-defense and the Kellogg Pact (Sen. Rept. No. 45, 77th Cong., 1st Sess., p. 4; House Rept. No. 18 [Pt. 1], 77th Cong., 1st Sess., pp. 5-6.)
8. *4 Treaties, Conventions, International Acts, Protocols, and Agreements,* 5130, 5132 (1928), (hereafter cited as "Malloy"). For reservations on self-defense see Department of State Publication No. 468 (1933).
9. See *The Virginius,* 2 Moore, *Digest,* 895-903, 967-968, 980-983; 6 *id.* 84-92; 1 Hyde, *Int. Law,* 114-115.
10. [The Lend-Lease Bill became law on March 11, 1941. Pub. Law 11, 77th Cong., 1st Sess. This essay was submitted on February 15—W.B.C.]
11. Final Acts, Department of State Bulletins, Oct. 7, 1939, pp. 321, 331; Aug. 24, 1940, pp. 127, 132-135.
12. Secretary of State Hull made it clear that this referred also to diplomatic and consular activities. (Statement at Habana, July 30, 1940, Department of State Publication No. 1488 [Conference Series, No. 47], pp. 4-5.)

that they had the right, in self-defense, to set up provisional regimes in American regions now in non-American possession, if a forced change of sovereignty should be threatened.[13] An emergency committee, to administer such regions, has been in existence since October 24, 1940.[14]

Freezing of Assets

There is a difference of opinion among international lawyers whether the German control of property, held by its nationals at home and abroad, is merely a high degree of police regulation or a virtual transfer of ownership to the German state with only the title and limited rights of use reserved to the national. If German assets in the American states are the public property of the German state, their "freezing" would presumably be justified on the ground of self-defense against propaganda, espionage, and sabotage. Such action (if ownership is in the German state) would imply a limitation on the scope of the international rule that the public property of a foreign state is immune from interference.

The Right of Angary

The so-called right of angary is a belligerent right to appropriate and use urgently needed neutral property within belligerent territory during the course of hostilities, provided just compensation is assured the owners. The chief application of this right in the past has been the requisitioning of neutral shipping in belligerent ports.

A press dispatch of February 3, 1941,[15] states that the Argentine Government is studying the possibility, under the right of angary, of requisitioning idle Dutch shipping in her ports. According to this report, the Argentinian position is that the states not at war have a right to use idle shipping in their harbors "urgently needed to meet national emergencies." This is hardly the law as it stands. Indeed, if Germany has expropriated such property, it would be an assertion that neutrals can appropriate belligerent public property. Such action would be akin to "freezing" the public property of a belligerent.

Whether or not the law should be developed in this direction depends to a large extent on how it is applied and on hemispheric defense needs. Under any such interpretation of the right of angary, owners of vessels would receive just compensation. If Argentina acts upon this basis it may be that other American governments will follow suit, as there are hundreds of European vessels idle in American ports. This would seem to be more desirable than having the vessels unproductive.

Neutrality and the Lend-Lease Bill

A neutral government, under general international law, is required to refrain from any participation in an existing war in the absence of a situation properly giving rise to the application of the principle of self-defense. It cannot furnish war material to belligerents. The 1907 Hague Convention concerning the rights and duties of neutrals in naval war absolutely forbids neutrals to supply belligerents with war material of any kind; provides that belligerent warships in neutral ports may make only such repairs as are necessary to render them seaworthy; that belligerents may not add to their fighting force; and that they cannot increase their supplies of war material or their armament in neutral waters.[16]

By contrast, the Lend-Lease Bill will permit the United States to manufacture, or procure, any "defense article" for the government of any country whose defense the President deems vital to the defense of the United States, and to sell, transfer, exchange, lease, lend, or otherwise dispose of any such article to any such government and to place any defense article in good working order for such a government.[17] Great Britain and its fleet could greatly benefit by this Bill. Secretary Hull admitted to Congress that if warships were assisted in our ports, the action would not be in accordance with the rules of neutrality, reflected in the Hague Convention, but took the position that it is unnecessary to comply with the Hague Convention, as present conditions permit the application of the principle of self-defense.[18] The Senate report and the House majority report likewise justify the Bill both on the principle of self-defense and also under the Kellogg Pact.[19]

The Lend-Lease Bill will set an important precedent in implementing the principle of self-defense. Even before its passage some Latin American countries had assured the United States that they would follow a similar policy. The same self-defense considerations, which "emasculated" the Kellogg Pact through numerous reservations, are now in effect being used to enforce the principle of nonaggression which underlies the Pact.

III

The Monroe Doctrine

The Monroe Doctrine (1823) has important effects on inter-American relationships today. The Doctrine is a policy of the United States;[20] it is not international

13. Act of Habana, Final Act, Department of State Bulletin, Aug. 24, 1940, pp. 127, 138-139.
14. Press News, Pan American Union, Oct. 24, 1940.
15. By the Associated Press, reported in New York Times, Feb. 4, 1941.
16. Articles VI, XVII, XVIII; 2 Malloy 2352, 2359-2361.
17. Defense article is defined as: "(1) Any weapon, munition, aircraft, vessel, or boat; (2) Any machinery, facility, tool, material, or supply necessary for the manufacture, production, processing, repair, servicing, or operation of any article described in this subsection; (3) Any component material or part of or equipment for any article described in this subsection; (4) Any other commodity or article for defense." (§2)
18. Mr. Hull made this clear in a memorandum read to the Committee on Foreign Affairs of the House on January 15, 1940. For text see Hearings on H.R. 1776 (House), 77th Cong., 1st Sess., pp. 8-10.
19. Sen. Rept. No. 45, 77th Cong., 1st Sess., p. 4 and House Rept. No. 18 (Pt. 1), 77th Cong., 1st Sess., pp. 5-6.
20. It now seems to apply in favor of Canada as well as the Latin American countries. (Department of State Press Releases, Aug. 20, 1940, pp. 123, 124.)

law nor, contrary to a current impression, is it a part of the law of the United States.[21]

Two Aspects of Doctrine

There are two aspects of the Monroe Doctrine. The first, which stems from self-defense, is that the United States will prevent or redress external aggressions against the territorial integrity or political independence of Latin American states, as any such action is "dangerous to our peace and safety." The second is that the American continents are not subject to colonization by any European power.

The Doctrine was gratefully received at first by the Latin Americans. Doubts of its value to them were expressed later. Latin Americans understood the basic desire of large states to influence the affairs of nearby states; they believed, with Disraeli, that nonintervention was impossible, in the long run, for a great power; and they knew that similar pledges by European states to maintain the territorial integrity of the Ottoman Empire were but a prelude to its partition. The association of the Monroe Doctrine with "imperialism" still has a considerable effect on inter-American relationships. The so-called Roosevelt corollary, Olney's "fiat," the "big stick," and "manifest destiny" are still remembered.

Such fears have been partly dispelled by the application of the Good Neighbor policy, the "continentalization" of the Monroe Doctrine,[22] and the nonintervention protocol.[23] Some Latin American countries (especially those geographically closest to the United States) hope to be able, while the United States needs their cooperation, to translate certain aspects of the Good Neighbor policy into treaty obligations, so that the United States, even with changing administrations, will be bound to prevent a recrudescence of former practices. Other Latin Americans believe that the present United States policy is the only sensible one for the future, as any attempted intervention would involve consultation. They are impressed with the changed Republican attitude, especially as reflected in the 1940 campaign.

The trend now in Latin American countries is to regard the Monroe Doctrine as belonging to them as much as to the United States—each is now bound to guarantee the territorial integrity of the others. They are collectively developing international law and have jointly expanded the non-colonization principle of the Monroe Doctrine by providing for the contingent administration of European colonies and possessions in this hemisphere. Consultation is thought of as a continentalized Monroe Doctrine in action.

IV

The Consultative System

But consultation in reality means much more than this. Though not wholly distinguishable from diplomatic methods, consultation denotes a conference procedure, designed primarily to enable all ministers of foreign affairs of the American states, or their specially authorized representatives, personally to counsel together at designated capitals in order to find and adopt cooperative methods of preserving the peace, irrespective of whether a threat to disturb it arises from within or from without the hemisphere.[24]

The American governments are committed to consult "without delay" when the following occasions arise: Threats of aggression from outside the hemisphere (including Fifth Column activities); threats to change, or actual changes of, the sovereignty of any geographic region of America, now subject to the jurisdiction of non-American states; failures to observe the Security Zone; threats of hostilities between two or more American states; and interventions of one American state in the affairs of another. Indeed the initiation of consultation is justified by any act susceptible of disturbing the peace; or (upon agreement) any important economic, cultural, or other question, in which the American states have a common interest.

Under the Declaration of Lima a consultative meeting, if unanimous, has enormous power: It can take any measures it deems advisable under the circumstances of a particular case to preserve the peace[25] and it was assumed at Lima (1938) that the consultative procedure would be adequate for the American states jointly to determine the aggressor in particular cases and to decide upon appropriate inter-American sanctions.[26]

21. The two proposed joint resolutions, introduced in the Senate and the House on June 3, 1940, providing that the United States would not acquiesce in any attempt to transfer any geographic region of the Western Hemisphere from one non-American power to another (S.J. Res. 271 and H.J. Res. 556), "died" in conference (Calendars of House, and History of Legislation, 76th Cong., pp. 196, 272). The Senate has however endorsed the Doctrine by implication in reservations to 1899 and 1907 Hague Conventions (2 Malloy 2032; 2 *id.* at 2247). [Subsequent to the writing of this essay, S. J. Res. 7, 77th Cong., 1st Sess., was enacted as Public Law 32 on April 10, 1941. It provides "(1) That the United States would not recognize any transfer, and would not acquiesce in any attempt to transfer, any geographic region of this hemisphere from one non-American power to another non-American power; and (2) That if such transfer or attempt to transfer should appear likely, the United States shall, in addition to other measures, immediately consult with the other American republics to determine upon the steps which should be taken to safeguard their common interests."—W.B.C.]

22. For documentary bases of "continentalization" see: 4 Malloy 4817, 4819; Declaration of Lima (1938), Final Act, Eighth International Conference of American States (hereinafter cited as Declaration of Lima (1938), Final Act), pp. 115-116, Department of State Press Releases, Dec. 24, 1938, p. 474; Final Act, Consultative Meeting (Panamá), Department of State Bulletin, Oct. 7, 1939, pp. 321, 334; Final Act, Consultative Meeting (Habana), Department of State Bulletin, Aug. 24, 1940, pp. 127, 136.

23. In 1936, at the Inter-American Conference for the Maintenance of Peace (Buenos Aires), all American states, including the United States, committed themselves to the proposition that the "intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties" is inadmissible. They also agreed that in the event of any such intervention they would consult. (4 Malloy 4821, 4822.)

24. 4 Malloy 4817, 4819; 4831, 4833. Diplomatic procedure was apparently used in arranging the joint inter-American protest to France, Great Britain, and Germany after the *Graf Spee* incident. No consultative meeting of foreign ministers, or their specially authorized representatives, was called, but the Department of State Press Release recites that the protest was made "following the procedure of consultation." (Department of State Bulletin. Dec. 23, 1939, p. 723.)

25. Declaration of Lima (1938), Final Act, pp. 115, 116.

26. *Id.* at 43-44.

Consultation and Mediation

Though consultative meetings have thus far dealt chiefly with external problems, they may shortly become important in intra-hemispheric relationships. An intense boundary dispute is now in progress between Ecuador and Perú; the relations between the Dominican Republic and Haití have been severely strained since the massacre of several thousands of Haitians on the Dominican frontier in 1937; and Bolivia still aspires to Arica (Chile) as an outlet to the sea. The American states have agreed not only to consult in all matters between themselves which affect the peace of the hemisphere, but not to have recourse to hostilities or take any military action whatever for six months while consultation is in progress.[27] The object of such consultation is to have the parties settle their dispute on the merits, in accordance with treaty obligations under the inter-American peace machinery.[28]

Declaration of Lima

The implications of such mediating functions were expanded in the Declaration of Lima (1938): The American states declared that "in case the peace, security or territorial integrity of any American Republic is * * * threatened by acts of any nature that may impair them, they proclaim their common concern and their determination to make effective their solidarity, coordinating their respective sovereign wills by means of the procedure of consultation, * * * using the measures which in each case the circumstances may make advisable."[29] The prospective development of precedents and rules in the field of mediation in the Western Hemisphere can best be seen by comparing this Declaration with Article 11 of the Covenant of the League of Nations. Article 11 declares that "any war or threat of war, whether immediately affecting any of the Members of the League or not, is hereby declared a matter of concern to the whole League, and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations."

Comparison to League of Nations

The terms of the two provisions are substantially the same. Both declare that a threatened breach of the peace is a matter of common concern; that the parties may, in jointly attempting to keep the peace, take such action as may be appropriate thereto under the facts of particular cases; and both are applicable, irrespective of whether or not third states are directly affected by the threat. The main differences, apart from phraseology, are that the Declaration of Lima is in the form of a declaration and limited to threats of war against inter-American peace, whereas Article 11 is in treaty form and applies to a threat anywhere.[30]

The League's practical application of Article 11 to concrete cases contributed to the technique of the prevention of war in the case of disputes between small states. Article 11 was the League's mediating provision, under which a provisional remedy known as the "cease-fire" practice developed.[31] The existence of a threat of war was enough to seise the Council without the need of determining the aggressor.

Under the cease-fire practice the following things could be done by the League Council immediately upon the outbreak of hostilities or a serious threat thereof: Issue warnings to the disputants reminding them of their treaty obligations to settle disputes by peaceful methods; order them to cease firing and to withdraw their armed forces behind their own borders; make a temporary armistice, pending a decision on the merits; use neutral military attachés on the spot to carry out its orders, who could give specific directions implementing the Council's orders and personally supervise the cessation of hostilities.

The inter-American consultative system carries the same implications. Less drastic procedure would presumably be applied, at first at least, in settling inter-American disputes. Persuasive procedure, similar to that applied in the Chaco dispute, would probably be adopted.[32] Nevertheless if an American disputant were recalcitrant and if there were unanimity on the part of all the American states (other than the disputants), a consultative meeting, in the name of all the American states, could bring great pressure to bear on the disputants to settle the dispute on its merits in accordance with the inter-American peace machinery.

This inter-American engagement to mediate has great implications for the future development of precedents and rules for peaceful settlement through the consultative system, if there is a continuing will to use it.

V

Economic Matters and Protection of Property

Developments in international law and organization are also taking place in relation to economic matters generally and to the protection of property of nationals abroad.

Most-Favored-Nation Treatment

It is realized in the United States that the free flow of commerce is a highly important factor in the economy and unity of the country. There is not equal unanimity in respect of free international trade, even as regards the American states. International law and organization

27. Convention to Coordinate, Extend and Assure the Fulfillment of the Existing Treaties between the American States, 4 Malloy 4831, 4833.

28. For peace machinery, see 4 Malloy 4691; 4756; 4763; 4793; 4798; 4817; 4824; 4827; 4831.

29. Declaration of Lima (1938), Final Act, pp. 115, 116.

30. On the inter-American use and the legal effect of declarations see *infra*, section VI.

31. For a comprehensive treatment, see T. P. Conwell-Evans, *The League Council in Action* (1929).

32. On the methods used in the Chaco mediation see Department of State Publication No. 1466 (Conference Series No. 46) and Spruille Braden, "The Chaco Peace Conference," Department of State Press Releases, Jan. 7, 1939, pp. 1-9. (Mr. Braden was the delegate of the United States.)

are far less advanced in the economic field than in the political. The existing principle of international law is that states are free to decide for themselves whether or not they will grant favors to other states or groups of states, and there is no international counterpart to the Interstate Commerce Commission or the Federal Trade Commission.

Secretary Hull's unconditional most-favored-nation trade agreements policy is a concrete program for the reciprocal moderation of excessive trade barriers. The inter-American conferences since 1933 have approved this policy, but the American governments have not always applied it in practice.[33] The basic problem is the same in Latin America as in the United States. Powerful protectionist interests exist; customs unions are being considered; exchange controls, quotas, import licensing arrangements, regional preferences, and other discriminatory measures are being applied.

Much continuous uphill work will be required to persuade the American governments to apply the unconditional most-favored-nation principle on a hemispheric basis. The Inter-American Financial and Economic Advisory Committee, established at Panamá (1939), was created with this purpose in mind and to cope with the perennial economic and financial problems of Latin America which had become acute with the outbreak of the European war.[34]

The Financial Committee is composed of twenty-one expert economists, one representing each American government. Its function is to study a mass of economic and financial problems "on the basis of those liberal principles of international trade" approved at inter-American conferences and make recommendations for their solution by treaty arrangements and other methods. Most of the recent inter-American economic and financial developments center around the activities of this Committee. It has established numerous subcommittees, both national and inter-American, including the important Inter-American Development Commission;[35] has drafted and negotiated a Convention for the Establishment of an Inter-American Bank and an Inter-American Coffee Agreement; has held a maritime conference; and is now studying inter-American regulation of cacao, cotton, and surplus products generally.

Diplomatic Protection of Property

Certain Latin American states have been attempting for some time to limit, even to abolish, the diplomatic protection of property abroad.[36] The matter is of great importance to United States investors. The position against such diplomatic protection is as follows: The prospective foreign investor must take into account the hazards which are common to business in the country; if he invests he identifies the destiny of his capital with the social trends in the country; if he suffers a deprivation, he must charge it to profit and loss; he cannot invoke the aid of his government in demanding compensation through the diplomatic channel, and especially he must respect the terms of a Calvo Clause.

The legal basis of the argument is expounded as follows: Diplomatic protection of property is intervention, which is now inadmissible;[37] as states are equal under international law, governments cannot claim, for their nationals abroad, more property rights than those of nationals of the country;[38] as a breach of international law cannot take place in relation to the property of a national, neither can such a breach take place in respect of a foreigner; as denials of justice are few, diplomatic protection is unnecessary, as property claims involving a breach of international law can be arbitrated.

Although there are cogent arguments in answer to these points, the argument cannot be wholly ignored. Without entering into this controversial question which has been debated since 1933, it may be said that it is unlikely that the argument will be abandoned. Not all governmental interferences with property are confiscations. An international law counterpart of the doctrine of substantive due process of law may develop.

With regard to the substitution of arbitration for diplomatic protection, it may be noted that as between the states of the United States the judicial process has been substituted "for the diplomatic settlement of controversies";[39] and there has been a recent tendency in the Department of State, in connection with diplomatic protection, to use a method closely resembling arbitral procedure, which seems to imply that the arbitral is deemed better than the diplomatic method.[40]

Arbitration

Any possible agreement to displace the diplomatic method of protecting property by the use of arbitration would however require a system of compulsory inter-American arbitration. No such system exists, but a plan for an inter-American compulsory system, limited to types of pecuniary claims which would include property claims, has been suggested and is now being

33. The most important recent evidence of the inter-American desire to qualify the most-favored-nation clause was manifested at the River Plate Regional Conference, held at Montevideo from January 27 to February 6, 1941. Nine conventions were signed and resolutions were adopted favoring a modification of the clause in existing commercial treaties. Argentina, Bolivia, Brazil, Paraguay, and Uruguay took part in the conference. Chile, Perú, and the United States had official observers there.

34. Final Act, Department of State Bulletin, Oct. 7, 1939, pp. 321, 324-326.

35. For a description of the functions and work of this Commission see article by John C. McClintock, Executive Secretary, "Inter-American Development Commission," Export Trade and Shipper, Aug. 26, 1940, pp. 3-5.

36. The best statement on this trend is contained in a paper delivered by Ramon Beteta, then Undersecretary of Foreign Affairs of the Mexican Government, at the Eighth American Scientific Congress, held in Washington May 10-21, 1940, and the reply of Professor Edwin M. Borchard. These papers have not as yet been published, but are available for inspection at the Department of State in Washington.

37. 4 Malloy 4821, 4822.

38. Article 9, Convention on the Rights and Duties of States, signed at Montevideo, Dec. 26, 1933, 4 Malloy, 4807, 4809.

39. North Dakota v. Minnesota, 263 U.S. 365, 373 (1923).

40. See "The Hannevig Case," 32 A.J.I.L. 142-148.

discussed by a few interested persons, including some Latin American diplomats in Washington. The plan is to do away with the obligation to pay awards in cash if the American governments will agree to settle their claims on the basis of international law. The primary purposes underlying the idea are that, through the development of judicial precedents, the body of international law will be increased and the foreign office claims dockets cleared up. As awards are made, credits will be placed in special arbitral accounts. As great a portion as possible of balances due will be cancelled by a clearing house process. The remainder will eventually be settled by the delivery of surplus products. To avoid upsetting the domestic economy of the sending or the receiving state the deliveries will be made in small annual amounts over a long period of time, or by other diplomatic *quid pro quo's* such as port dues, trade agreements, or water rights.

In the light of the current trend in inter-American relations to entertain new ideas and to achieve results, it is not inconceivable that such a project may appear at Bogotá in 1943. A large body of international law precedents would result from a thoroughgoing application of such a program.

Foreign Confiscations

The international rule that the courts of one state will not inquire into the validity of the acts of another state, while still generally upheld, is under much stress in the United States at present because of alleged confiscatory acts of foreign governments.[41] In situations where foreign states ignore international law, as by confiscating the property of aliens or attempting to give extra-territorial effect to confiscatory decrees, the courts of American states may change this rule and refuse enforcement on the ground that such acts are contrary to public policy or international law.[42]

VI

Multipartite International Instruments

The inter-American conferences are progressively making use of multipartite international instruments. Although these are frequently designated as "declarations"—in one instance as an "Act"[43]—they have been spoken of officially as "agreements"[44] and as "understandings reached."[45] Three declarations have been set forth by Under Secretary Welles in an official publication as being part of the "juridical framework" of the system of consultation[46] and the Habana Consultative Meeting officially considered the Declaration of Panamá to have "juridical effects."[47] Declarations are sometimes approved by executive decree in Latin America; they are multipartite instruments of an international character, frequently of a highly important nature, adopted by a large group of governments at international conferences in a manner far more formal than the usual executive agreement or an exchange of notes; and the Declaration of Lima is considered to be such a fundamental part of the inter-American "continentalization" scheme that its binding character will hardly be questioned by any American government.[48]

Effect of Non-Conventional Agreements

International lawyers are in disagreement as to the legal effect of international instruments not made in conventional form. The binding force of the formal declaration is still an open question.

This inter-American development is challenging. The chief reason for the use of declarations by the American states is that Latin American governments too have legislative difficulties related to ratification.[49]

It may be observed in this connection that the form of an international obligation, whether conventional or declaratory, is not determinative of its effectiveness. Article 10 of the Covenant of the League of Nations, in terms, purports to extend the territorial integrity policy of the Monroe Doctrine on a world-wide basis, but it was never really applied, though adopted in treaty form. The declarations contained in the Monroe Message, on the other hand, were not in treaty form but have been applied with telling effect by the United States, and it is difficult to believe that the "continentalized" Monroe Doctrine will be less respected by Latin American governments because it is based, in part, on the Declaration of Lima. In the final analysis the efficacy of any international instrument depends upon the will to effectuate it.

The decision of the Permanent Court of International Justice, in the *Eastern Greenland* case cannot be overlooked in this matter. The Court held that a verbal "declaration" of a foreign minister was binding, "beyond

41. See for instance the majority and minority opinions of the New York Court of Appeals in the case of *Moscow Fire Ins. Co.* v. *Bank of N. Y. and Trust Co.*, 280 N.Y. 286 (1939).

42. See *id.* at 304 and Wolff v. Oxholm, (1817) 6 Maule & Selwyn 92.

43. Act of Habana Concerning the Provisional Administration of European Colonies and Possessions in the Americas, Final Act, Habana (1940), Department of State Bulletin, Aug. 24, 1940, pp. 127, 138.

44. *Id.* at 127; Department of State Publication No. 1416 (Conference Series No. 43) p. 75.

45. Department of State Bulletin, Sept. 7, 1940, p. 196.

46. Department of State Publication No. 1451 (Conference Series No. 44), p. 3.

47. Department of State Bulletin, Aug. 24, 1940, p. 129.

48. Speaking at Lima (1938) Secretary Hull said: "The people of the American republics have a proud history of the use of declarations. Their national life has grown in and out of the declarations of independence which mark their birth. And so in this Declaration of Lima lies the future of the solidarity of the American republics. It rests on the history and spirit of the peoples and such can be the only guaranty of its significance. It will be determined—under the test of grave events—by the constancy and ardor with which the American republics consecrate themselves to the great and creative task of keeping alive that program of principles which have guided us in our deliberations, and on which peace and well-being under law and order must rest." (Department of State Publication No. 1416 [Conference Series No. 43], pp. 75-76.)

49. Secretary Hull said at Lima that it is wise to state inter-American agreements in declarations, rather than in treaties or conventions, when the matters dealt with are of a general character and of a political nature. (Department of State Publication No. 1416 [Conference Series No. 43], p. 75.) The Act of Habana was not submitted to the United States Senate for its advice and consent to ratification.

all dispute," upon his state.[50] Considering the informality of the foreign minister's statement, and that the decision was handed down by the Permanent Court, it would be difficult for any international tribunal to hold that a formal multipartite declaration was less binding upon the signatories.

This development may have important implications for the future development of the law, and should perhaps be considered in relation to the difficulties involved in the adoption of well-stated codifications.[51]

VII

Prospective Development of International Law

The key to the prospective development of international law in the Western Hemisphere lies in the continuation of the practical statesmanship recently exhibited in the institution of consultation. The spiritual effect on Latin Americans of the "continentalization" of the Monroe Doctrine, and of being dealt with as equals, is tending toward an inter-American solidarity, different from the "Pan Americanism" of the past. Much thought and energy are being devoted to inter-American political, military, economic, and social problems; sixteen Pan American conferences are scheduled to meet in 1941; and there are press suggestions that another consultative meeting may be called soon to deal with the changing attitude on self-defense.

The importance of the consultative system is reflected in the viewpoint that consultation fulfills, or can fulfill, all the vital inter-American needs, and that consequently an American League of Nations is not needed. The meetings at Panamá and Habana "faced unprecedented problems and conditions." The Panamá meeting, called within a week after the outbreak of European hostilities, was in session in less than three weeks thereafter, some delegates arriving by airplane. At Habana the amount of business reached the proportions of a full-fledged inter-American conference.

In contrast to a generally chaotic outside world, where law in international relations is to a large extent being replaced by force, the American hemisphere may conceivably become the repository of the primary principles of international conduct considered as binding on states for the past three centuries. The American governments and peoples seem to be progressively realizing this; and while they are aware of the need for reëxamining certain fundamental postulates they are also conscious that, if the current developments of law by the American states are ultimately to contribute to the growth of an orderly world, the rules they initiate must be designed to operate, not only to the advantage of some of the American states or all of them, but to the world at large.

50. Legal Status of Eastern Greenland, Series A/B, No. 53, pp. 69-71 (1933). Cf. 1 Hudson, *Int. Legis.* xv.

51. On the difficulties of codification, see Moore, "Fifty Years of International Law," 50 Harv. L. Rev. 395, 400-403; Borchard, "The 'Committee of Experts' at the Lima Conference," 33 A.J.I.L. 269 *et seq.* But inter-American work of codification seems to be going forward. Pursuant to instructions from the Lima Conference (Final Act, Lima [1938] pp. 32-34) the Pan American Union, in April 1940, published five volumes classifying and comparing various projects and reports on peaceful settlement presented to the Lima Conference. (It is entitled: *Improvement and Coordination of Inter-American Peace Instruments.*) The Habana Consultative Meeting (1940) urged the various inter-American codifying organizations to submit their recommendations as soon as possible in order that the International Conference of American Jurists could be convoked within the next two years. (Final Act, Department of State Bulletin, Aug. 24, 1940, pp. 127, 135.) The Conference of Jurists is to report at Bogotá in 1943. (Final Act, Lima [1938] pp. 32, 34.)

"LEGAL ADVENTURER"

"Last week we described Lord Jeffreys as a great 'Legal Adventurer.' By this term we did not mean to impute to Lord Jeffreys what are conventionally supposed to be the opportunisms of the adventurer. We simply wished to distinguish between two classes of great men who have attained to high place in the hierarchy of the English Judicature. There are eminent lawyers who are essentially 'Men of Law,' and nothing else. That is to say, they take up the Bar early in life as a profession, pursue it to success, and regard it as their main practical object in life. Of course, they may be interested in a hundred other things, including religion or politics; but it is primarily because of their eminence as professional men of law that they attain to success. Lord Selborne, Lord Russell of Killowen, Sir George Jessel, and Lord Mansfield; these are familiar and obvious examples. But there is another class of men in whose care law is not, and manifestly never has been, the 'ruling passion,' who nevertheless attain to the Woolsack or to high professional eminence mainly through success in politics, or in society, or in some other sphere of life. Such men are often very able advocates and capable judges, but their legal standing alone would not have won them a high place in the Judiciary. To mention present-day names would be invidious; but obvious historical illustrations are Wedderburn, Lyndhurst, Brougham, and Chief Justice Cockburn. Every one of those men had consummate ability and filled fitly his high place when he arrived thereat; but it was eminence in politics or reform, or as a man of the world, which won it for him. Such men, in no invidious sense, we call 'Legal Adventurers,' and it is in this sense that we applied the name to Jeffreys. Such men, of course, have often been nobler and better men than the mere pedestrian lawyer seeking only professional success. Our term was not in any sense one of prima facie opprobrium."—*The Solicitor's Journal and Weekly Reporter*, Jan. 14, 1922.

MOBILIZING THE PROFESSION FOR DEFENSE*

By HON. ROBERT H. JACKSON
Attorney General of the United States

EUROPE has resumed its ancient strife, and other peoples of the world are obliged to give considerations of defense and security first place in their thoughts. Our philosophy of government makes the law by which the physical forces of the nation are controlled quite as definitely a part of our defense program as the mobilization of the force itself. We lawyers are again holding spring meetings under the auspices of our several legal societies to consider the state of our law. But we do not feel easy about it because we are finding it really difficult in the present condition of the world to give first consideration to our normal programs, to restatements of the law, to revisions of our court procedures, and to general advancement of the peace time administration of justice. My association with your own and with related societies interested in the betterment of the administration of justice dates from long before I entered public office and makes the office-holder's customary profession of sympathy with your usual purposes superfluous. I can get right down to what is troubling me.

Deficiencies in Our Law for Defense Purposes

If we should put first things first, the legal profession would turn its highly competent and disinterested legal staffs to resolving the almost unbelievable conflicts, confusions and obscurities in the mass of law that governs our defense activities. I do not suggest that the organized legal profession could or should project itself into the complex and controversial questions of policy that are inherent in many of the legal questions presented to us now. But, apart from any differences over policy, much of our statute law, supplemented by judicial construction in some instances, is technically deficient to meet present-day demands.

Opportunity for Service by the Profession

It is almost impossible for the legal staffs of the government departments involved, pressed as they are by the routines of their work and immersed as they must be in daily perplexities, to give either the time or the detached thought necessary to the coordination and modernization of the many laws and interpretations of laws relating to defense activities.

There is some further disadvantage that attends our efforts in this direction due to the fact that we inevitably are regarded as proponents of a policy and advocates of an administration, but I venture to say that no more vital effort could be made than to name appropriate representatives of the legal profession and set them upon the task of considering what we may denominate broadly as defense law and its improvement.

Declaration of War Often Omitted

Perhaps the greatest single difficulty arises from the changed custom of states as to the method of initiating a war. Our statutes for a century have been framed with the idea that war would begin with a gentlemanly and honorable declaration of war. That chivalrous practice has disappeared. Wars today are fought and won before they are declared. Any nation that in the presence of rising hostility and strain with another awaits a declaration of war to assert itself is as naive as a citizen who expects a burglar to make a formal call to announce his house-breaking intentions.

Critical Period Preceding Use of Force

It is safe to say that under modern methods of warfare the most critical period for a nation under attack is the period preceding the actual employment of military force. It is then that forces are set in motion that will expedite or impede the military effort and which will either strengthen or rot out a nation's morale. In country after country, from Czechoslovakia to Greece, we have seen this pattern of a pre-military and non-military invasion, an invasion of business, finance, labor unions, public opinion, and political organizations, all accomplished with the liberal use of expert personnel operating entirely under the protection of the laws of the land being invaded. The secret weapon of the Nazis has been the failure of nation after nation to recognize and deal with this non-military invasion.

Statute Law Out-Moded

Our statute law has in many respects failed to take into account this non-military period of attack. A good many of the government's abilities to deal with its defense still await the existence of a formal state of war. For example, the nation's power to deal with certain disloyal aliens as "enemy aliens" has been considered to await some formal recognition of a state of actual belligerency. Yet we would be blind to the experience of a modern war if we did not recognize that actual activity by foreign agents who are realistically, if not legalistically, enemy aliens does not depend upon any declaration of war.

It may be said generally that most measures of internal defense can be successfully carried out only before the

*Address before Annual Meeting of the American Judicature Society, Washington, D.C., May 7, 1941.

excitement and hysteria and bustle of necessary preparations strike a nation.

Duty to Anticipate Eventualities

We are fully aware in the Department of Justice that we are under the duty to anticipate and prepare for the worst of eventualities, although we may hope and pray for deliverance from them. As the department whose ties are so close to the legal profession that the functioning of our department as a whole may be fairly said to depend in large measure upon the confidence and good will of the profession, it will be of advantage if I tell you frankly some of the things that are troubling us as to the measures that could be taken wisely to discharge this high responsibility. I recognize that the ultimate success of our work and judgment upon it will depend upon the good opinion of those who are more detached than we who are in the heat of the thing can possibly be. You will quickly and rightly condemn us for any neglect of the public interest. You will also quickly and rightly condemn us for any disregard of the rights of individuals to differ with the government and to take measures which are considered to be within the range of their civil liberties, even though they result in some degree of nullification of the government's efforts. In fact, our fate will probably be that a portion of public sentiment will do both.

Dual Responsibility of Department of Justice

It is no news to you that it is difficult to serve two masters. Yet the Department of Justice must labor under dual responsibilities. The public rightly expects its law officers to protect what the old indictment forms call "the peace and dignity" of the commonwealth. On the other hand, the most unimpeachable authority commands us to protect and respect the rights of individuals to do many of the very things that may be steps in the process of undermining the stability of the commonwealth.

It is inevitable that in the presence of threats to our national prestige and integrity our people will demand increased emphasis on the rights of the commonwealth. These public pressures for priority to security of the state over the liberty of the individual arouse slumbering conflicts in which emotion, temperament, and experience often divide us more bitterly than the logic of either position would warrant. The task of keeping the confidence of public opinion which shapes today's events and at the same time of steering a course that will be approved by the sober second thought of the nation is not easy.

It will help us to appraise these difficulties if we appreciate that our own principles and techniques for guarding our freedoms are by no means universally accepted among free peoples. In fact, our own system is the exception rather than the rule. The peculiar rigidity and uncompromising character of our American procedures is in sharp contrast with the procedures of Great Britain as they have been detailed for us by an eminent friend of civil liberty, Mr. Harold Laski.

British Solution of This Problem

The British solution of this dilemma between public safety and private liberty may be shortly stated as a combination of large official powers coupled with moderation in their exercise. The absence of a written Constitution leaves the government as a whole in possession of all powers which any organized society may possess. Out of its ample power Parliament confers in times of emergency correspondingly broad powers upon England's executive officials. English civil liberties thus depend for their survival, not upon legal limitations so much as upon a high sense of responsibility, a temperament of moderation, and a tradition of nonpartisan and non-political action on the part of legislators and executives, and by judges as well. Britain, to save liberty, relies on limitations bred into the blood and bone of Englishmen and fostered by their culture more than it relies on parchment freedoms.

A recent article by Harold Laski points out that "the Government has powers little short of absolute over the lives and property of its citizens" in Great Britain. For example, a regulation permits prosecution of persons charged with creating alarm and despondency. I think you will agree that a proposal to give any American prosecuting officer such a power would be met with screams of opposition. However, the British Government has apparently made moderate use of the power, prosecuting only about 105 cases. A dozen of them were dismissed. Of those convicted, only 20 were sentenced to imprisonment varying from one day to three months, while the remainder were either bound over or fined.

Under a regulation granting power to suppress processions and public meetings, only three meetings have been prohibited in the whole country. The widest sort of criticism of the government has been tolerated, even from Communists. Yet where national safety was endangered two Communist newspapers were suppressed, pursuant to a control of the press that would not be allowed in this country.

Perhaps the most drastic regulation is one which gives the Home Secretary the power to detain persons whose conduct and views make it seem likely that they may be guilty of action prejudicial to the safety of the realm. Under this power about 1,000 persons are detained. Some others have been arrested and later released. A power so unlimited and so vaguely defined, available against both citizen and alien, is unheard of in America.

Whatever the merits or defects of this British policy, the conferring of such broad powers upon a public official leaves little room for an alibi if he does not protect the safety of the state. On the other hand, the existence among his constituents of a vigorous and wholesome respect for civil liberties and for decent treatment of the individual leaves him under a sense of responsibility which goes a long way to prevent abuses of that power. While Mr. Laski does not acquit

the police of instances of "stupidity and harshness" and while he admits that "one or two magistrates in alarm and despondency cases have played the fool on the bench," he asserts that "more than that the record does not permit anyone seriously to claim." Making allowance for the pressure which the imminence of invasion would seem bound to produce, we still must regard England as a citadel of civil liberty. And who will say that England is "soft"?

American Methods Compared

Broadly stated, our American method of protecting our liberties is the exact opposite of the British. By constitutional limitation we impose upon all government, including the Congress, the courts, and the executive, numerous and inflexible limitations. Our government does not have the full powers of most organized societies, partly because some such powers are reserved to the States, but also because many powers commonly exercised in Europe are withheld or forbidden entirely. Our devotion to the philosophy of limitation of power is so ingrained that the Congress and our legislatures adopt it as their policy and make very limited concessions of power to executive officers. The American assumption is that officers will abuse whatever powers they have. Too frequently the expectation is realized. Every period of our national history which has felt great stress and tension from abroad has left a trail in the administration of justice that we do not retrace with pride.

Narrowness of Public Powers

However, I want to put it to you squarely whether the excesses in the administration of justice and in investigative techniques which have prevailed during times of public excitement and which our profession has rightly condemned as reprehensible, do not bear a distinct relationship to the very narrowness of the powers which are granted to our officials. I have found that the greatest pressures to overstep the bounds of lawful law enforcement arise in situations in which existing legal procedures permit *no action at all* looking toward the protection of society. Confession of inability to use the law for ends that are generally held desirable gives rise to a search for means outside the law or to a vigilante movement among the populace. It is certainly an open question whether a liberty to abuse liberty does not generate a danger to liberty itself. My confidence in the perpetuity of civil liberty in Great Britain is due in no small degree to the knowledge that the law officers will be able to prevent such abuses of those liberties as would give rise to their impairment.

On the other hand, the greatest danger that I can see to American civil liberties lies in the fact that they are so rigid. The English officials responsible, by prompt and moderate actions, tend both to satisfy the public that abuses will not be allowed to reach the magnitude of a public menace and also to exert a restraining hand on the abusers. In America up to the present moment we have found no technique by which the outright abuse of these privileges is preventable even when abused in the interests of a foreign government.

Antiquated and Ill-Adapted Statutes

To the future of the liberties we have known it is of utmost importance that our laws be made as effective as possible within constitutional and proper policy limitations. Lack of adaptability of antiquated statutes to present world conditions should be remedied. Deficiencies in the discretion to judges and to administrative officers should be remedied. Conflicts and confusion should be eliminated by restatement of our statutes. Let me suggest a few things that are happening that I think could be partially or fully remedied by adequate application of legal craftsmanship. The continued existence of these conditions is in my judgment as menacing to liberty as to safety.

Problem of Deportable Aliens

We have over 6,000 deportable aliens, against whom proceedings have been completed and deportation orders are outstanding. But, because of transportation breakdown or because of refusal of their native countries to accept their return, they are still here. They are not only here, they are *free*. They include some bad criminals and a considerable number of Communists proven to have advocated overthrow of our government by force and violence. But we can cite to the courts no statute to authorize us to do anything whatever with them when deportation fails. Hence, they are turned loose in habeas corpus proceedings and resume their evil ways in our society.

We have proposed remedial legislation. It is of great importance to the whole subject I am discussing. It needs the criticism where we are wrong and the help where we are right, of the organized lawyers.

Problem of Foreign Agents

Another example: We arrest foreign agents for doing acts detrimental to the country. The Constitution commands bail. A little bail is fixed, put up by the help of their Governments, and they walk out of the courtroom and return to their jobs of producing discord in America. We must find means to a more prompt and emphatic way of enforcing our own law. It is peculiarly a problem for lawyers.

Problem of Sabotage

We have today definite knowledge that the sabotage of ships in our ports was ordered by simultaneous telegrams sent to all ships' masters. They tell us that themselves. Yet the law officers of the United States cannot intercept those messages and use them as evidence in our courts. The wires of America today are a protected communication system for the enemies of America. Here, again, we have proposed legislation, carefully limited legislation, to give us an equal chance on the wires with saboteurs. Again I say—if we are

wrong, we need your criticism; and if right, we need your help.

Propaganda Problem

The whole field of combating alien-directed and financed propaganda against the policy of our government is one of infinite legal difficulty, as you know. I do not think we are completely and constitutionally helpless, but we are sharply circumscribed. May we not compel propagandists to identify their stuff as we compel newspapers to disclose their ownership. Must we not only allow foreign attacks on our policy but also carry it for them in our mails? These are problems not easy of solution, they hit close to things fundamental in our life. Their solution is no job for amateurs.

And let me say to you that the enemies of America are not idle. They show up at Congressional hearings to oppose every move to strengthen our law enforcement; they show up in court astutely to raise every legal difficulty to prevent convictions and to obstruct obtaining evidence; they propagandize endlessly against investigative officials and agencies, against prosecution policies, against law enforcement itself. The force and prestige of the organized bar is needed to vindicate the competence of the law itself to deal with the burdens that the times put upon it.

Free and Generous Cooperation by the Bar

I want to take this occasion to acknowledge free and generous cooperation from leading members of the bar who, without compensation, are assisting us in the discharge of duties—such, for example, as that of giving fair, impartial, and sympathetic hearings to conscientious objectors in the separate judicial districts of the nation.

I frequently have offers of services from my public-spirited fellows of the bar who want to offer their services, and I know that in professional organizations there is no lack of public-spirited men who would be glad to give their service if they could be mobilized.

Need for Putting Our Legal Defenses in Order

I venture to suggest that nothing could be more helpful today than the organization under the auspices of some of our legal societies of a high-minded and disinterested group to canvass and appraise suggestions for putting our legal defenses in order. I say to you in all frankness that government lawyers are in a better position to tell you the problems than they are to work out the solutions. The pressure, the want of time, the burden of routine, and the commitment to departmental policy, prevent us from giving this sort of thing the quality of service it needs. You could bring to that task a quality of legal experience, of practical knowledge, and of public confidence in your disinterestedness which could be of inestimable benefit. I venture to suggest that the restatement and modernization of laws relating to defense in the light of modern emergency is as timely as any work in which the organized legal profession may engage.

Mobilization of the Profession

If I could in one sentence state an appeal to my brethren at the bar, it would be this: "For the sake of your profession, your liberties, and your country, mobilize the great intellectual resources of your various societies in a master effort to put the law of national defense in order."

Defense Bills to be Studied by ABA

[See Address of Attorney General Robert H. Jackson, ante]

A SPECIAL committee of the Association, to study national defense measures proposed to congress by the Department of Justice, has been named by President Jacob M. Lashly.

Former Solicitor General Thomas D. Thacher, New York, will serve as chairman. Other members will be Walter P. Armstrong, Memphis, nominee for President of the Association; Edmund Ruffin Beckwith, New York; George I. Haight, Chicago, Illinois; Grenville Clark, New York; William D. Mitchell, New York; David A. Simmons, Houston; and Philip J. Wickser, Buffalo.

"The appointment of this committee," said Mr. Lashly, "is the direct result of, and in response to, an address made by Attorney General Robert H. Jackson before the meeting of the American Judicature society May 7. Two specific matters were referred to by Mr. Jackson in his speech, as to which he declared the country is without adequate laws for proper national defense.

"One instance mentioned was that of the proper handling of the situation arising when the return of deportable aliens is refused by their native countries. There are over 6,000 deportable aliens against whom proceedings have been completed and deportation orders are outstanding. But since their countries would not receive them, they are still here and they are free from any restraint.

"The second instance mentioned was that of wire-tapping. Mr. Jackson stated that the department feels the nation is not sufficiently protected at the present time against criminals, spies, and saboteurs who communicate with one another by means of the telephone and telegraph without fear that their messages will be used against them in any criminal proceedings.

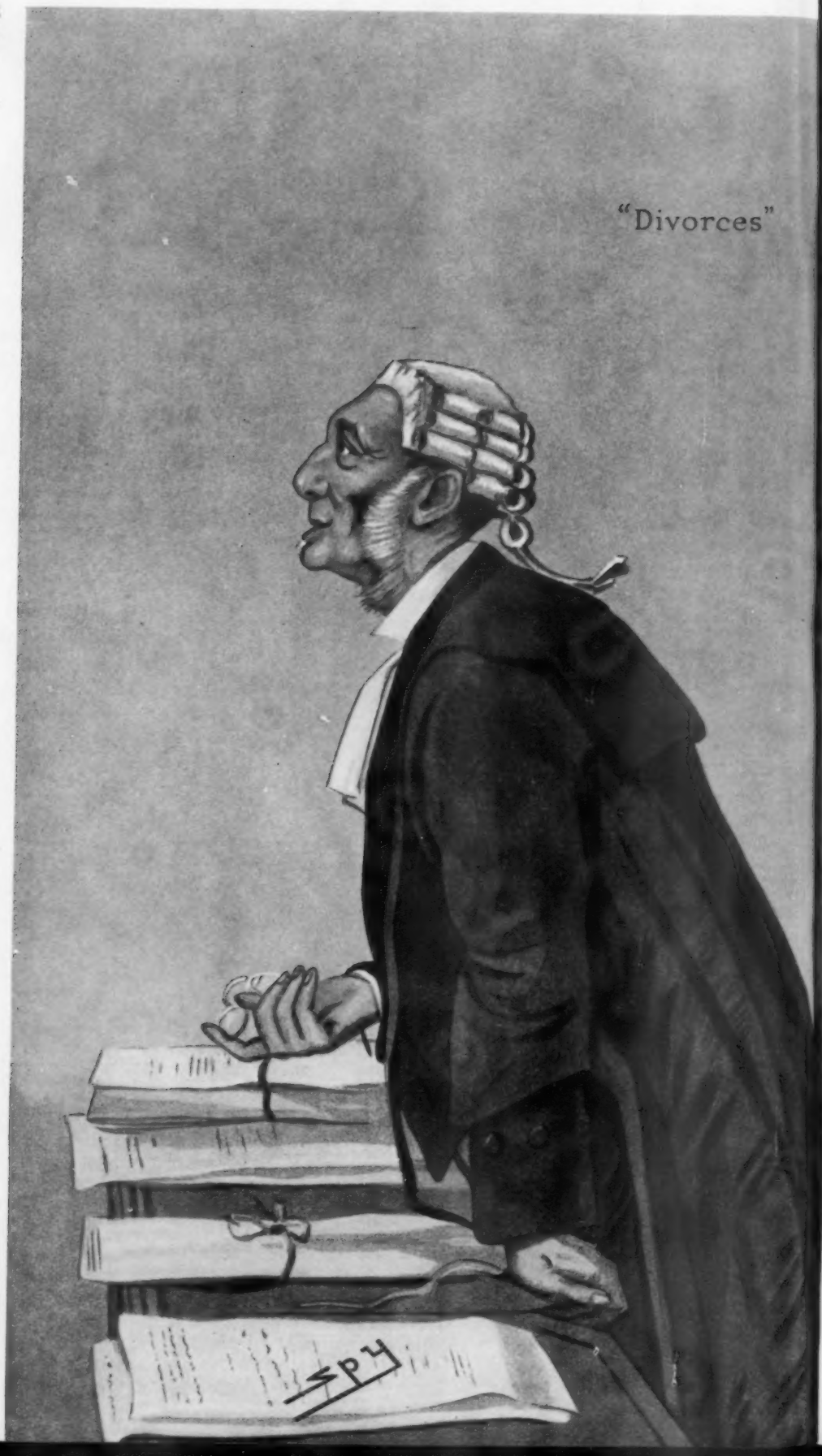
"Bills to meet these two situations are now pending in congress. Mr. Jackson stated there are many other problems concerning which adequate legislation ought to be prepared, studied and presented to the congress and the country.

"In concluding his speech the attorney general made a strong appeal to the members of the organized bar to take up these subjects, study them, and give them the weight and benefit of their training toward the solution of those problems most vital to our national defense.

"Immediately following this appeal the Board of Governors of the Association determined to accept the challenge," Mr. Lashly said. "The appointment of this committee is the first step in carrying out that purpose."

DIVERSITIES OF THE LAW

IV



CARTOON BY "SPY"
From Vanity Fair
London, July 30, 1896

BOOK REVIEWS

Democracy in Government, by John J. Parker, 1940. Charlottesville, Va.: The Michie Company. This little book of ninety-five pages contains three lectures by Judge John J. Parker, of the United States Circuit Court of Appeals, before the University of Virginia College of Law, in 1940.

Like most current discussions of topics which the title suggests, interest awakens, or abates, as the speaker treads closer to, or farther from, the fire which has burned bright (and hot) since the New Deal philosophy of the last ten years has found expression in one bit of legislation after another. Intensity of interest depends, not upon the side taken, but upon the speaker's vehemence in support of, or opposition to, this philosophy. Only neutrals fail to arouse interest or hold attention. Too often, discussion by a member on the bench falls into this neutral type. It arouses no interest or enthusiasm because not partisan. Its value is confined to a cure for insomnia. In fact there seems to be an affinity between judicial literature and slumber.

Judge Parker is by no means a neutral in these lectures, nor is he an extremist. The only way of determining the extent to which he goes in rejecting the doctrine of *laissez faire* is to read his book. I recommend it.

As might be expected, the subject is narrowed to democracy in *our* government. An historical, philosophical, legal discussion of the problems of democracy in the United States, under the Federal Constitution, properly describes this treatise.

The three chapters of the book are headed: "The Individual and the State," "The Exercise of Sovereignty," and "Government by Law."

The first lecture is somewhat fundamental and abstract. It deals with the interdependence of citizens and democratic governments. Expressed in the following sentences taken from this chapter, may be found the heart of the writer's philosophy:

> "While isolated thinkers in the United States have from time to time subscribed to the *laissez faire* theory of the physiocratic school, it is well to remember that this has never been the philosophy upon which our government has proceeded."
>
> "And so it has come about that, in our thinking, the government is not a mere policeman charged only with the duty of preserving peace and order and letting economic and social forces work themselves out. We have accepted the view that it is the proper function of government, not merely to preserve peace and order, but to undertake any activity in behalf of society which the social welfare demands and which the individual either should not undertake because of the social interests involved or would not undertake because of its magnitude or for other reason. As President Lincoln expressed it: 'The legitimate object of government is to do for a community of people whatever they need to have done, but cannot do at all, or cannot do so well, for themselves, in their separate and individual capacities.'"
>
> "The whole fabric of economic life has become so complex that the misfortunes of one group of workers or producers may be the cause of nation-wide calamity. Under such circumstances it is idle to imagine that the power of the government will not or should not be used for the proper regulation of economic life. Monopolies must be curbed. Unemployment must be relieved. Justice must be secured in the relations of capital and labor. Some measure of economic security must be provided by the state in the form of old age and unemployment insurance for those who are dependent upon industry of state-wide significance."

The worth of a series of lectures is to be measured by the discussion and debates which it produces. The first chapter kindles the fire, the second develops the bed of coals, and the third spreads the conflagration to listeners and readers.

The second chapter deals largely with the so-called "federal system" of government, with its division of powers between the State and Federal governments. The danger of enlargement of powers of Federal government is stressed as is the fear of excessive local demand upon the resources of the Federal government.

In this, as in the first chapter, the author well expresses his philosophy in a single paragraph, which we quote:

> "Adequate governmental regulation of our economic life is absolutely necessary, in my judgment, if we are to preserve our system of free enterprise from some form of collectivism. *Laissez faire* is gone, if, indeed, it was ever here. Unregulated economic life means that the little man is helpless in the grasp of those who are strong enough to direct economic forces; and free men will no more submit to economic tyranny than they will to political tyranny. Unless they can control economic forces so as to preserve justice in economic life, it is inevitable that they will listen to those who promise economic welfare through state ownership and operation of productive enterprise. Any adequate regulation of economic life means regulation by the national government, since those phases of economic life as to which there is greatest need of regulation are national in scope and influence."

Chapter 3 deals with the discussion-provocative subjects of: Rejection of stare decisis; the misconstrued observation, "The law is what the judges say it is"; the power and the duty of the court to pass upon the validity of legislative action; the temporary effect of judicial errors; the wisdom of making diversity of citizenship ground for Federal court jurisdiction.

Perhaps most challenging of all these subjects is the argument that Federal courts should protect residents of a foreign state against local prejudice, and, to do so, entertain jurisdiction of disputes between citizens of different states. The assertion that local prejudice makes justice in the state courts uncertain, or worse, is highly debatable. Only a Gallup poll would reveal the sentiment of the entire bar on this local prejudice in state court trials. Granting the existence of prejudice, which the writer does not believe exists, at least in most states, the author ignores the evils attending the action of citizens of one state (say Illinois) going to Delaware to organize a corporation to conduct a business in Illinois. Not only may it thus transfer suits from Illinois State courts, even when issues are local, but, as in 1929 to 1933, it may go to Delaware to institute bankruptcy proceedings or to reorganize, to the detriment of Illinois creditors and to the chagrin and the justifiably deep disappointment of the members of

the Illinois bar. The motive of the Chicago promoters, in organizing in Delaware to do a business in Chicago, is the same as prompts the New York or Illinois divorcée to go to Nevada for a divorce. Each state makes the same kind of appeal. Neither is worthy or idealistic. Each is practicing prostitution in its particular field. What concerns us now is the effect of such practice on Judge Parker's argument in favor of Federal Court jurisdiction based on diversity of citizenship. There are many of us who believe that Federal jurisdiction based on diversity of citizenship in any case should require more than $3,000 to be involved and, second, greater uniformity in state laws respecting powers of corporations.

We will pass the author's argument of lesser justice in state courts due to the lack of power of state judges, for another time, by saying, there is doubtless a difference of opinion on this subject.

Judge Parker is earnest and emphatic in his statement of the court's status. He says:

> "You will search history in vain for any instance where tyranny or despotism has been established by a court; and on the other hand, one of the first steps in the establishment of a despotism is to limit the power of the judiciary."

Reassuring is the further statement:

> "Even in the case of erroneous decision it merely delays action, and talk of judicial tyranny is nonsense. The income tax decision delayed the income tax only twenty years and the Adkins case held back minimum wage legislation for a less period than that. . . .
>
> "'Whoever [said the *Federalist*] attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.'"

The trouble with these last-quoted pronouncements is that some doubting Thomas may innocently inquire, How about the Dred Scott decision? Did you ever read the Legal Tender cases?

And what then?

Other thought-producing discussions there are, but enough is enough. We thank you, Judge Parker, for speaking so happily and so helpfully.

EVAN A. EVANS

United States Circuit Court of Appeals, Chicago

Jubilee Law Lectures: 1889-1939, edited by School of Law, The Catholic University of America. 1939. Washington, D.C.: The Catholic University of America Press. Pp. 182.—On its fiftieth anniversary, the School of Law of the Catholic University of America arranged two series of lectures, the first on "The Church in Legal History" and the other on "The Function of Law in Society Today." This little volume preserves these lectures. The first series of the lectures was by Dean Roscoe Pound of Harvard, his titles being "The Idea of Universality," "The Idea of Authority," "The Idea of Good Faith," and "The Idea of Law." The second series presented Daniel J. Lyne of Boston on "The Future of the Common Law," Grenville Clark of New York on "Law and Civil Liberty," Hector D. Castro of El Salvador on "Natural Law and Positive Law," and Judge John J. Burns of Boston on "Law and Ethics."

The fiftieth anniversary of any human institution affords an excellent opportunity for a kind of stock-taking, not only of the particular institution itself, but of the whole field of activity in which the institution serves society. These two series of lectures take good advantage of that opportunity. They are, in fact, almost an outline of the history of our law. Dean Pound's four lectures show broadly the development of the common law system and its underlying philosophies up to now, and present the common lawyer's point of view toward the current effort to establish administrative efficiency as an improvement on "old-fashioned" judicial justice, which effort seems to many, but not to Dean Pound, to be a socially necessary repetition of the modernization of law which occurred when equity was fused with the legal system. Mr. Lyne in his lecture disagreed with Pound's preference for the past, and saw in an enlightened administrative procedure a truer guaranty of human liberties for the future than is apt to be achieved by orthodox and cumbersome judicial procedures. Grenville Clark with stern realism pointed out that in the past as well as in the present and the future, in our own country and in other nations as well, the preservation of civil liberties is not so much a matter of written guaranties and procedural techniques as it is a matter of the attitudes and habits of thought of a people, as illustrated by the fact that even in America there are times when these liberties, fundamental though they be, are substantially minimized by popular majorities and courts acting almost as if in unison. M. Castro's lecture was an interesting chapter from the past of legal philosophy, presenting a kind of "revealed" natural law as the foundation of all jurisprudence. Finally, Judge Burns forecast the essentially ethical basis of America's law of the years yet to come as we may hope that it will be if a Christian ideal, as distinguished from a Spenglerian fatalism, guides its growth.

Judge Burns points out that there is a consistent underlying theme in all eight lectures—the testing of positive law by an ethical concept. Lawyers and laymen alike may disagree—and undoubtedly do disagree—as to what form law and legal procedure should take if they are to achieve an ethical ideal, but at least it is agreed that there is an ethical ideal and that the law should aim for it. Dean Pound speaks of this urge toward the ideal as a revival of natural law, whereas pragmatists revolt from the notion that there is such a thing as natural law. No one can deny that these differences in philosophy are meaningful, but at the same time all must admit that, so long as American lawyers and legal philosophers build deliberately toward an ethical ideal in law, we need not fear unduly for the future of our law, and a School of Law can continue to be a worthy unit in a great Catholic university.

ROBERT A. LEFLAR.

Fayetteville, Arkansas.

Thanksgiving, Its Source, Philosophy, and History, with All National Proclamations and Analytical Study Thereof, by H. S. J. Sickel. 1940. Philadelphia: Press of International Printing Company. Pp. 258.—This book grew out of a hobby—one that must be unusual even among hobbies—the collecting of Thanksgiving Proclamations. Mr. Sickel did not find it altogether a simple thing, but this merely added zest. Proclamations were not to be found in any one place, not even in the Department of State. Books and libraries had to be searched, and the files of old newspapers. He now considers his task complete, and he gives us the text of all the presidential proclamations and a history of the observance of the day.

If the first Thanksgiving in 1621 was announced by proclamation in Plymouth, apparently no copy of it remains. The first proclamation which Mr. Sickel could discover is one issued by the Council of Massachusetts in 1676. This appointed the 20th of June of that year as a day of solemn thanksgiving and praise for successes in Indian warfare. The second was nearly a hundred years later, when Francis Bernard, Captain-General and Governor-in-Chief of the Province of Massachusetts Bay in New England, enjoined upon the ministers of the Gospel and their congregations the observance of the third of December as a day of public thanksgiving, first, as the chiefest of blessings, for the preservation of the Royal Family, and secondly for the healthy and kindly seasons which had rewarded the labor of their hands with a sufficiency of the produce of the earth and the sea.

It would be interesting to have a history of the observance of Thanksgiving in Massachusetts and of its spread throughout New England, but Mr. Sickel turns from these beginnings in Massachusetts to the national observance of the day.

As an annually-recurring festival throughout the nation Thanksgiving has no very long history. It dates only from the Civil War, although there were instances in the early days of the Republic and even before. During the Revolution the Continental Congress and its successor, the Congress of the United States, appointed a day of Thanksgiving in each year from 1777 to 1783, and failed to do so in 1784 only through lack of a quorum. After that there was nothing until Washington, in 1789, set a day of Thanksgiving for the establishment of the new Government, and one in 1795 in recognition of the general prosperity. Madison had one at the close of the War of 1812, but from then on the custom lapsed until 1862, after which there was no break in the annual observance of the day. During the intervening period, in times of distress, there were days appointed for national humiliation and prayer, and Mr. Sickel includes in his volume the proclamations by which these were announced.

The last Thursday in November was the day appointed by Washington for his first Thanksgiving in 1789, and from 1869 to 1939 that day has the support of unbroken precedent; but before that there was no uniformity. In the Revolutionary period and immediately thereafter a day in December was the usual choice. Washington had a Thanksgiving in February, Madison one in April, Lincoln one in April and one in August. As to the day of the week the precedents in favor of Thursday are all but unanimous.

This book, though in a minor field, is of historical value.

ARTHUR M. BROWN.

Boston, Massachusetts

The Politics of Democracy: American Parties in Action, by Pendleton Herring. 1940. New York: W. W. Norton. Pp. 468.—Is anything wrong with the party system generally and with the American variety of it in particular? Last fall it was agreed that the presidential campaign had been "a dirty one," though hardly more dirty than certain previous contests. It is agreed that party platforms are vague and often empty, and that there is little realism in party politics. Yet, patently, the so-called one-party system is no party system at all. It is merely another name for autocracy, absolutism, dictatorships.

Is there, then, no other, sounder, worthier alternative? Professor Herring, of the Harvard Graduate School of Public Administration, in a remarkably candid and suggestive book on "American parties in action," intimates that the abuses and deplorable weaknesses of our party system are not inevitable, but for some reason, not quite clear, he refrains from discussing or indorsing any of the improvements proposed—as he says—by "our liberal weeklies." Of one thing he is sure, that our major parties will not label themselves conservative and liberal. No major party, he holds, will ever admit that it does not represent "the people," or that it serves vested interests and opposes progressive ideas. (Why *Britain* has a conservative party, he does not explain.)

Our major parties, according to Professor Herring, reflect the sentiments and beliefs of the great majority and, on the whole, satisfactorily serve the actual needs of the nation. They are timid and slow, but they do take up reforms after the minor parties, that have no hope of success, or of spoils and power, render them tolerably popular and safe. The humbug, cant, sensationalism and dishonesty of the major parties may irritate some of the high-brows, but they are part of the democratic way of life and of politics.

There is considerable unnecessary repetition in the book, and careful, critical editing might have reduced its bulk and made the thesis and argument clearer and more pointed. However, it is welcome to intelligent citizens as a lively, objective and timely survey of the political situation and the problems which face us at this critical juncture.

VICTOR S. YARROS.

Winter Park, Florida

INTERNATIONAL CONSTITUTIONAL LAW*

By AMOS J. PEASLEE

of the New York Bar

THIS TOPIC appears on the agenda of the Annual Meeting of our Society for the first time in the 35 years of its history. It brings us face to face with several basic questions:

Does the "Society of Nations" exist as a political entity?

Have we already, in a sense, a "super-sovereignty"—a system of World Government superior to the will of any single nation?

Is there such a thing as an International Constitution? If so, what sort of an instrument is it? What does it provide? What does it lack?

It would be easy to spend the evening discussing definitions of terms. Rather than to become involved in that, I propose to recall certain of the factual phenomena which have appeared during the past 300 years of the world's history, and let you answer the questions according to your own choice of language.

The International Body Politic and Bill of Rights

It is fruitless to embark on these speculations without considering at the outset the gravity of the present challenge to International Government and to International Law. Let no one underestimate the extent of that challenge. Germany's war aims go far beyond the destruction of the Treaty of Versailles of 1919. They are directed at the Peace of Westphalia of 1648, which gave birth to the modern concept of a Society of Free Nations.

Germany's war is a revolution—a civil war—against World Government, as we know it.

To those who urge that the existing international situation proves that such a government does not exist, my reply is that it proves precisely the opposite. The "hue and cry" is rising today, just as it did in the three years following August, 1914. Sooner or later—whether it requires three years or thirty—it will swing the will and the might of most of the civilized nations of the world to enforce the cardinal concept that there is a *right* to live at peace with, and to be free from brutal attacks by, other nations.

That passion to live and let live and to be free, is as prevalent among our South and Central American neighbors as it is among our English speaking cousins. It is to be found, with a few unfortunate exceptions, in every corner of the globe.

If "Democracy" were confined—as some of our present day philosophers tell us—to only about 15 of the 64 (more or less) nations of the world, or to 6 nations, or to our own nation alone, we would view with great alarm the possible outcome of this challenge. But there is no justification for so limited a definition of the "Democracies," either in the constitutions of the nations or in their governmental operations. About 95% of the 64 nations possessed in 1939 written constitutions providing for a form of government very similar to our own. Over half of those constitutions had been adopted since 1920 and about a quarter, since 1930. With rare exceptions each contained a "Bill of Rights" guaranteeing liberty and equality of the individual, freedom of speech, freedom of the press, freedom of thought and conscience, and guaranties against arbitrary powers of the State.

If democratic institutions and free thought and free speech have proved anything within the span of a single generation, they have demonstrated that there are underlying conceptions which are common to the minds of most men—that friendliness and neighborliness and justice, are predominant instincts among 90% of the people of the World.

The American Institute of International Law at its first session in 1916 adopted what it described as a "Declaration of the Rights and Duties of the Nations." That declaration enumerated five fundamental national rights—

(1) the "right to exist and to protect and to conserve its existence," but not "by the commission of unlawful acts against innocent and unoffending states."

(2) The right of "independence" and the "pursuit of happiness" and the right "to develop itself" with due regard to the rights of other states.

(3) The right to equality before the law and before other nations.

(4) The right to exercise "exclusive jurisdiction over its territory and all persons, whether native or foreign, found therein."

(5) The right to have its rights "respected and protected by all other nations"; for, said the Institute, "right and duty are correlative and the right of one is the duty of all to observe."[1]

World Government is not synonymous with Universal Peace. Man has outlawed crime in Municipal Law but he has not abolished it. Better World Government will not soon, if ever, mean a state of perfect peace, but it will mean the discarding in the Law of Nations of

*Address before the American Society of International Law, Washington, D. C., Friday evening, April 25, 1941.

1. See The Recommendations of Habana concerning International Organization, Scott, Oxford University Press, 1917, pp. 22, 67; and U. S. Supreme Court cases there cited.

many concepts held a generation ago of unrestricted national rights.

The vigor of the fiction that neutrality and isolation are possibilities when international crime develops on a wholesale scale, are evidence of the indignant demand of each nation that it has the right to be let alone.

Mr. Root in his presidential address to this Society in 1908 called attention to the fact that the first public national act in the new world of the Western Hemisphere, as found in our Declaration of Independence, was an appeal to the "decent respect for the opinions of mankind."

One of our human peculiarities is that we seem to require a common antagonist in order to combine effectively for a common purpose. I have sometimes thought that the organization of the Society of Nations has been retarded because it is an all inclusive concept. Perhaps the assaults against free nations which were launched in 1914, and again with intensified fury in 1939, have had at least one use. They have proved that without effective World Government no individual nation can be assured of the enjoyment of its basic rights, or even of its independent existence.

Legislative Organs of the Society of Nations

In the field of International legislation up to the present time law making processes have differed basically from those of National Governments. There is not and never has been a Congress or Parliament of the Nations, or of any considerable number of them, to which the nations have delegated legislative power.

The phenomenon of international relations which most closely resembles a national legislature is the International Conference. Some conferences have been occasional, such as the Hague Conferences of 1899 and 1907, the London Naval Conference of 1908-9, the Versailles Conference of 1918-19, the Washington Disarmament Conference of 1921-22, the "Conference for the Progressive Codification of International Law" held at The Hague in 1930, the "Inter-American Conference for the Maintenance of Peace" held at Buenos Aires in 1936, and—in earlier times—the Congress of Vienna of 1815, and the "European Congress of Catholic and Protestant States" of 1644-1648. Other International Conferences have been periodic or more or less permanent in their character, such as the Sessions of the Assembly and Council of the League of Nations and the eight periodic "International Conferences of the American States" held from 1887 to 1938.

But whether periodic or permanent, International Conferences have never assumed to exercise the final sovereign powers of a legislature.

They merely draft and propose measures. The measures become effective when, and only to the extent that, they are ratified by the nations represented at the Conferences.

International legislation is, of course, not limited to the products of International Conferences. Many multipartite treaties partaking of the nature of legislation have been negotiated entirely through diplomatic channels. Some conventions such as the one providing for the creation of the Permanent Court of International Justice, are described within their own terms as "statutes."

If we go as far as Judge Hudson[2] we should place in the category of International legislation some 257 conventions, treaties, protocols, declarations, acts or agreements signed during the 50 years preceding 1914, and not less than 400 which were signed during the 20 subsequent years. Personally I should describe some of the documents which Judge Hudson terms "legislation" as being more in the nature of contracts. Many of them, however, undoubtedly belong to the field of legislation.

Some conception of the rate at which international legislation is now being ground out, is to be gathered by recalling that at the single Seventh International Conference of American States held at Montevideo in 1933, 95 resolutions, 6 conventions and 1 protocol were adopted, and at the Special Inter-American Conference for the Maintenance of Peace at Buenos Aires in 1936, 11 treaties and conventions were signed, all of which were in the nature of legislative acts.

Crisscrossing among the nations there is a vast network of legislative documents which are becoming ever more important in the relations of the nations and somewhat appalling in their increasing complexity.

Finally, in contemplating the field of International Legislation we should recall the progress which has been made toward codification of International Law. The work in the Western Hemisphere which began by the appointment of the Commission of Jurists at the Rio Conference of the American States in 1906 finally ripened into the creation of the Committee of Experts which held its first meeting at the Pan American Union in April, 1937. The League of Nations Assembly and Council, as you know, provided in 1924 for the creation of a Committee for the Progressive Codification of International Law. At the first International Conference which met at The Hague in March and April, 1930 under the inspiration of that Committee, 48 states were represented. The draft conventions prepared by the Harvard Research experts trace their roots to that Committee and that Conference.

The most serious handicap which confronts any effort to codify or improve International Law is the cumbersome existing machinery for accomplishing international legislation. We know the difficulties experienced by the Assembly of the League of Nations under the principle of unanimous consent, and of its efforts to avoid or circumvent that principle in procedural measures. International legislation will continue to be lacking in simplicity of enactment, and will always be of scattered geographical application unless and until the nations are willing to delegate to permanent representatives actual legislative powers.

2. "International Legislation from 1919 to 1934," Hudson.

Judicial Organs of the Society of Nations

This audience is far too familiar with International judicial organs to warrant even a summary review of them as they function today. The Judicial Department of the Constitution of the Society of Nations—if we may employ that term—is, as we should expect, more mature than its legislative department, for as we know, the development of law by custom and through arbiters and judges has almost always preceded legislation chronologically in the evolution of governmental organisms.

The Permanent Court of International Justice within the past two decades has become a functioning and living body. The Mixed Arbitral Tribunals in Europe and the German and Mexican Mixed Claims Commission operating in the Western Hemisphere since 1919, dealt with a volume of cases surpassing both in number and importance anything hitherto known in the history of International Arbitrations. The Mixed Claims Commission, United States and Germany, alone handled over 15,000 separate cases. Several of its single cases or groups of cases involved larger sums and graver issues than the entire Alabama Arbitration or any other single arbitration to which the United States had previously been a party.

Not less than 130[3] separate conciliation, arbitration or compulsory adjudication treaties were signed by nations during the single decade which followed the conclusion of the last war, in addition to such general conventions as the Geneva Protocol of October 2, 1924, the General Act for the Pacific Settlement of International Disputes of September 26, 1928, and the Inter-American Treaties of Conciliation and Arbitration signed at Washington on January 5, 1929.

Six separate drafts of projects for the establishment of an "Inter-American Court of International Justice" submitted to several of the International Conferences of the American States from 1923 to 1936, have been made the subject of a study and report by the Governing Board of the Pan American Union.[4]

Useful as these and other developments of International judicial organs have been, they are, with few exceptions, still haphazard in their character. At the Versailles Conference in 1919 I was bold enough to suggest[5] that in addition to provision for a World Court in the Covenant of the League of Nations (whose first draft lacked any such provision) authority should be granted for the creation from time to time of inferior courts—much in the same manner as our United States Federal Courts were established, in order ultimately to create a permanent unified International Judicial System.

Executive and Administrative Organs of the Society of Nations

Any super-sovereign executive power for the Secretariat of the League of Nations was repeatedly disclaimed when the League was founded, and from time to time thereafter.

The Governing Board of the Pan American Union also shrinks from admitting any executive powers among the nations of the Western Hemisphere. You will recall that at the Buenos Aires Inter-American Conference for the Maintenance of Peace in 1936, attended by President Roosevelt, a resolution was adopted recommending extension of the scope of the work of the Pan American Union. On January 3, 1938, the Governing Board approved a comprehensive Committee report which said:[6]

> "It was the thought of the founders of the Union that through such cooperation an international atmosphere would be created in which any disputes that might arise, would lend themselves to orderly settlement, through mediation, conciliation or arbitration. It is true that at successive International Conferences of American states an elaborate mechanism for the maintenance of peace has been developed, but the organs for this purpose are not integral parts of the Pan American Union, but may be said to run parallel to it. * * *"

Since the Pan American Union traces its origin to a section of the State Department of the United States Government, and since its Governing Board still consists of diplomatic representatives of the 21 nations of the Western Hemisphere resident at Washington, D. C., it is easy to understand why, for these reasons alone, it would hesitate to admit that its functions are executive in any super-sovereign sense. The report approved by the Governing Board refers, however, to "an elaborate mechanism for the maintenance of peace," which runs "parallel to" the functioning of the Pan American Union.

Whatever terminology we may employ, as to the functions of the Pan American Union or of the Secretariat of the League of Nations, we certainly find not only within those bodies but also within a great many other international organs, many of the attributes of administrative and executive institutions. The Bureau of Universal Postal Union has long been a most valuable organ of that character. So have the International Telegraphic Bureau, founded in 1868, the Bureau for the Protection of Industrial Property founded in 1883, the Union for Protection of Literary and Artistic Property, created in 1888, and various boundary commissions, plebescite commissions, commissions for the control of navigable rivers, and commissions dealing with air navigation. At one single American Conference—the Seventh International Conference of American States at Montevideo in 1935—eight international commissions were created.

How far it is to the interest of the nations to continue

3. For list of these see "Post War Treaties for the Pacific Settlement of International Disputes," Habicht, Cambridge Univ. Press, 1931.

4. "Report of Projects on the Establishment of the Inter-American Court of International Justice" submitted to the Governments of the American Republics by the Governing Board of the Pan American Union in Compliance with Resolution IV of the Inter-American Conference for the Maintenance of Peace (See Bar Ass'n N. Y. Pamphlets, Fol. Vol. 187).

5. See "Proposed Amendments to the Judiciary Articles of the Constitution of the League of Nations," Peaslee, February 27, 1919, submitted to the American members of the American Commission to Negotiate Peace.

6. See Report of Director General, Pan American Union, 1938.

to disclaim any super-sovereign attributes for these various agencies may be open to question.

Conclusion

What then are your answers to the questions which this topic has raised? Is there already an unwritten Constitution of the Society of Nations?

Whatever your answers may be, we must face frankly the fact that such Government as the Society of Nations now possesses has proved inadequate to preserve peace and order and to guarantee the rights of the nations. The Constitution of the Society of Nations at best is an infant organism which has not developed the immunity to disease or the vigor which we shall expect of it in its riper maturity.

It is not the province of the American Society of International Law to attempt to state any "war aims" or "peace aims." We may observe, however, that rapidly changing social customs inevitably demand changing institutions. The nations of the world during the past few decades have become vast economic organisms. They require, if complete chaos is to be avoided, far more effective instrumentalities of international government than now exist. Such organs must be financially self-supporting. They should be all embracing in their concept. With 300 years of failure of mere alliances and associations, and with the experience of two world wars in a single generation costing[7] per day in money alone more than what should be the normal cost per year of effective organs of international government, we can afford to take daring risks.

As our beloved Chief Justice in his Presidential Address to this Society twelve years ago said:

> "The building of the institutions of peace is the most distinctive enterprise of our time. * * * The difficulties do not make the task any the less the supreme task of modern civilization. * * * We shall have to build and rebuild and then mayhap, to build again, but the construction process must go on."

7. See Thomas J. Watson's estimate of the cost of the last war at 23,000,000 lives and $337,846,000,000; International Conciliation, October, 1938, No. 343, p. 339.

CIVIL SERVICE FOR GOVERNMENT LAWYERS

ON APRIL 23, 1941 President Roosevelt signed an Executive Order covering into the classified Civil Service more than 100,000 government positions which were previously exempted, including about 4400 lawyers. This is the first time in history that the great majority of government lawyers as a class have been placed under Civil Service, and the action therefore is of large interest to the profession.

In January 1939 there was set up what has come to be known as the "President's Committee on Civil Service Improvement" for the purpose of studying this important question. It is interesting to note that four of the eight members of that committee were eminent lawyers, including Mr. Justice Stanley Reed, who was made chairman; Mr. Justice Felix Frankfurter; Mr. Justice Frank Murphy; and Attorney General Robert H. Jackson. The other four members of the committee were laymen. The committee submitted its report February 24, 1941. It is a book of 128 pages and has been printed by the Government Printing Office as House Document No. 118, 77th Cong., 1st Sess.

The effect of the President's recent order was to cover into the Civil Service about 4400 government lawyers. By provision of prior Statutes and prior Executive Orders, about 1000 government lawyers were already covered into the Civil Service. This means that at the present time about 5300 lawyers are now under Civil Service. The only substantial group exempted by the President's order are the Assistant United States Attorneys throughout the country. By Congressional action, the government attorneys in the TVA, about twenty-five in number, and the government attorneys in the WPA, about thirty in number, are not subject to being covered in the Civil Service.

The report contains a table giving the number of lawyers in government service, on May 15, 1939, as 5368. Of these 936 were already under Civil Service and 4432 are now brought under Civil Service. The table lists 53 different departments or agencies or bureaus of the government having lawyers affected by the order. It is interesting to know the figures for the number of lawyers in some of the major agencies, which are as follows:

1. Justice Department—1271
2. Treasury Department—433
3. Securities & Exchange Commission—310
4. Home Owners' Loan Corporation—276
5. Federal Trade Commission—246
6. Department of Agriculture—227
7. National Labor Relations Board—226
8. Reconstruction Finance Corporation—203

None of these lawyers were previously under Civil Service. Two other large groups of government lawyers had previously been placed under Civil Service, namely 580 lawyers in the Veterans' Administration and 299 lawyers in the Interstate Commerce Commission.

The report, on page 30, contains a table showing the groupings of government lawyers as to salaries. It there appears that the salaries and numbers of attorneys are now as follows:

$2000 to $2600	—	518 lawyers
$2600 to $3200	—	1030 lawyers
$3200 to $3800	—	1102 lawyers
$3800 to $4600	—	924 lawyers
$4600 to $5400	—	878 lawyers
$5600 to $6400	—	477 lawyers
$6500 to $7500	—	286 lawyers
$8000 to $9000	—	94 lawyers
Over $9000	—	59 lawyers
		5368

It is expected that about 500 vacancies per year will occur for which appointments will be made. It will be interesting to watch how this experiment works out and to observe its effect on the younger Bar on the one hand and the government lawyers as a class on the other hand.

AMERICAN BAR ASSOCIATION
JOVRNAL

General subscription price $3 a year. Students in Law Schools, $1.50 a year. Price per copy, 25 cents.

"The Battle Cry of Freedom"

AS in many other years, Chief Justice Hughes' address before the American Law Institute summed up in a few sentences the hopes and the high resolves which are uppermost in the minds and hearts of patriotic lawyers throughout our imperiled country. He voiced the ideals and the objectives which differentiate from all other systems of society the American structure of government by the governed, impartial justice according to law, and staunch resistance to the demands of pressure groups for breaking down the traditions of impartiality and fair play.

The stirring words of the Chief Justice should be chart and compass for every member of government, every organization of lawyers, and every citizen, in these troublous times. After sketching the accomplishments during the year in improving the administrative side of the work of the Courts, he concluded:

> "So we steadily advance in perfecting machinery and improving opportunity. Still, in every department of administration it is the human factor that counts most.
>
> "The community looks to our judges for competency, efficiency and impartiality, without which codes merely add to an accumulation of legal futilities. It is the privilege and duty of the judiciary to demonstrate the capacity of democratic government to have the peoples' laws administered without 'an evil eye and an unequal hand.'
>
> "The community also looks to the administrative agencies, which are multiplied in response to social needs, for competency, efficiency and impartiality in their respective spheres. Democracy cannot escape its pressure groups. Each interest has its imperious demands. These groups compete in the market place, in the forums of public opinion, in popular elections and in our legislative halls, but they have no place in the halls of judicial administration.
>
> "The lamps of justice are dimmed or have wholly gone out in many parts of the earth, but these lights are still shining brightly here. We are engaged in harnessing our National power for the defense of our way of life. But that way is worth-while only because it is the pathway of the just.
>
> "It is our high privilege, although our task may seem prosaic, to strengthen the defense of democracy by commending to public confidence and esteem the working of the institutions of justice in both State and Nation."

Our people are finding it difficult to rally the willingness and the will to make sacrifices which are necessary to adequate preparedness for the common defense. Group interest and self-interest make noisy demands, contrary to public welfare. There is a reluctance to take the industrial, military and naval steps which seem to be the alternatives to catastrophe. The American way of life is still confused as the merely easy way of life; the determination has not become general to make now whatever sacrifices are necessary for the time in order to assure adequate preparedness for defense. The Chief Justice has given a clarion call in behalf of fundamentals which must not be compromised or surrendered, and must be defended at all hazards.

Defense Law and Its Improvement

WE publish in this issue the timely address of Attorney General Robert H. Jackson before the American Judicature Society on May seventh. It should be read and thought about by every lawyer, not only because of the public importance and urgency of its subject, but because it intentionally states this appeal and challenge to the organized lawyers, mobilized under the leadership of the American Bar Association:

> "For the sake of your profession, your liberties, and your country, mobilize the great intellectual resources of your various societies in a master effort to put the law of National defense in order."

The subject is complex, difficult, and new, as the Attorney General frankly recognized in his Macedonian plea for help. The answers are not as simple as the existence of the problems of legislation and administration is obvious. The Attorney General depicts the new phenomena of non-military invasion and non-military attack, by alien and totalitarian ideas and agents. Patriotic lawyers have long been aware of this and have inveighed against it, repeatedly through the American Bar Association, from a realization that the most critical and decisive period for a nation, under present-day warfare, is generally the period preceding armed attack. It would be understatement to say that these earnest warnings by American lawyers have not always received alert and sympathetic response.

The Attorney General declares that "our statute law has in many respects failed to take into account this non-military method of attack." He points out that, "apart from any differences over policy, much of our statute law, supplemented by judicial construction in some instances, is technically deficient to meet present-day demands." His plea is now that "If we should put first things first, the legal profession would turn its highly competent and disinterested legal staffs to resolving the almost unbelievable conflicts, confusions and obscurities in the mass of law that governs our defense activities."

In short, the Attorney General, who has held posts of honor in the American Bar Association and has been for some years a member of the House of Delegates, asks the counsel and help of the organized lawyers in perfecting and advocating such laws as will remedy the present defects. He is aware that his specific proposals of legislation are meeting with formidable opposition, largely from groups with which he is often in accord. He states with candor the difficulty and dilemma which confront him and the Department of Justice:

> "It is no news to you that it is difficult to serve two masters. Yet the Department of Justice must labor under dual responsibilities. The public rightly expects its law officers to protect what the old indictment forms call 'the peace and dignity' of the commonwealth. On the other hand, the most unimpeachable authority commands us to protect and respect the rights of individuals to do many of the very things that may be steps in the process of undermining the stability of the commonwealth."

The American Bar Association likewise has a solemn responsibility to safeguard the essentials of freedom under law, at the same time that we do what we can to help demonstrate the capacity of a free people to organize and prepare to defend their institutions. After acknowledging "free and generous cooperation from leading members of the Bar, the Attorney General asks the organized Bar to assemble "a high-minded and disinterested group to canvass and appraise suggestions for putting our legal defenses in order. I say to you in all frankness that government lawyers are in a better position to tell you the problems than they are to work out the solutions. The pressure, the want of time, the burden of routine, and the commitment to departmental policy, prevent us from giving this sort of thing the quality of service it needs. You could bring to that task a quality of legal experience, of practical knowledge, and of public confidence in your disinterestedness, which could be of inestimable benefit."

Naturally, the American Bar Association, under the leadership of President Lashly and its Board of Governors, took steps immediately to bring together a representative group of its distinguished and open-minded members, to canvass what can and should be done. Neither the earnestness of the Attorney General's well-poised statement nor the complexity of the tasks of draftsmanship is likely to lead such a group to disregard principles to which American lawyers are deeply devoted. Meanwhile, each member of the Association should read, and form his own opinion as to the Attorney General's appeal.

Outstanding Contributions to Current Discussion

WHEN the late Judge Erskine M. Ross of California made a generous testamentary provision for an annual prize to be administered by the American Bar Association, this devoted friend undoubtedly had it in mind that from year to year, under the auspices of the National organization of lawyers, significant and useful contributions to the informed discussion of momentous questions might be brought about, through the offering of an award rich in honor and attractive in its financial emolument. The patriotic foresight of such a bequest, and the public benefits flowing from it, have been demonstrated each year, on a striking diversity of essay subjects, from the first competition for the prize in 1934, but never more so than in 1941, in the eighth competition for the Ross Essay Prize.

At a time when the future of free institutions in this hemisphere seems likely to depend on the soundness and the solidarity of the actions taken by the republics of North and South America, the Ross Essays for this year deal appropriately with the "Prospective Development of International Law in the Western Hemisphere as Affected by the Monroe Doctrine." Such a subject naturally produced notable essays, more than a few of them. Nearly all of the essays revealed an awareness that the grave dangers confronting the Americas compel a re-consideration of the traditional concepts of neutrality and non-intervention, in favor of a broadening accord of action based on the rationale of self-defense.

The winning essay, by Mr. Willard Bunce Cowles, of the United States Department of Justice, brings together in an impressive manner the developing precedents which are implementing the concept of unity for defense. It deserves study and thought by every lawyer who is trying to help his community or his circle of friends to think, speak and act wisely on current issues. We shall publish others of the submitted essays, in which noted American lawyers make fresh and constructive contributions to the discussion of this crucial issue in the field of international law and neighborly relations.

The American Bar Association is proud and happy to have brought about the writing and publication of these vital discussions, and we salute the memory of the revered jurist whose wise choice of agency for his benefaction has erected a lasting and living monument to his foresight.

Reginald Heber Smith

WE TAKE pleasure in announcing the unanimous election of Reginald Heber Smith of Boston, as a member of our editorial board, to fill the vacancy caused by the resignation of Dean Lloyd K. Garrison.

Our readers are to be congratulated on the addition to the editorial board, of one who for many years has been a faithful and hard working member of the Association, who has done notable work in the field of Legal Aid, and whose ability to express himself clearly and interestingly on subjects of concern to the Bar has been demonstrated by his series of articles recently published in the JOURNAL, on Law Office Management.

CURRENT PROCEDURAL OBJECTIVES

By WALTER V. SCHAEFER
Professor of Law, Northwestern University School of Law

THE past few years have brought to all lawyers developments of great significance in the field of civil procedure. For the lawyers of Illinois these years have been particularly eventful. In 1934, the Illinois Civil Practice Act became effective. The passage of the Act was preceded by a period of intensive activity on the part of state and local bar associations which aroused statewide interest in the improvement of procedure.

Illinois Civil Practice Act

The impact of the Illinois Civil Practice Act upon the procedural mores of the lawyers of the state was emphasized by the fact that Illinois had for decades been one of the last strongholds of common law pleading and practice. In a period of less energetic activity upon the procedural front, the changes effected by the Act might have been considered to afford sufficient material for assimilation by a generation of lawyers. But the transition period was not difficult. Widespread use of the processes of group self-education, coupled with a sincere interest in the success of the Act on the part of the judges and lawyers of the state, made the problem of adjustment a relatively simple one. Provisions for liberal joinder of parties and causes of action, for summary judgment and for effective discovery, soon lost their terrors under close study and sympathetic administration.

Before the period of transition in state procedure had ended the Federal Rules of Civil Procedure became effective. Orientation under the Federal Rules was relatively easy, for in broad outline the Illinois Civil Practice Act does not differ widely from the Federal Rules. The frequent references to the Illinois statute in the comments of the advisory committee to the Supreme Court which accompany the Federal Rules indicate the similarity of the two procedural systems. The outstanding differences between the state and federal practice lie in the continued recognition in the state procedure of "actions at law" and "suits in equity" and in the absence from the state procedure of the special verdict (in workable form), third party practice, and the declaratory judgment. Other differences, chiefly in matters of detail, are not such as to be the source of any serious confusion in practicing before state and federal courts.

Need for Continued Reform

There are now functioning, in state and federal courts, simple and efficiently operating procedural systems. A pause for relaxation might seem indicated. It is precisely at this point, however, that danger lies. Complacency and self-satisfaction, merited or not, are inconsistent with the continued maintenance of a satisfactory procedural system. The duty of maintaining such a system, which rests squarely upon the bar, is not fully performed when the adoption of a presently efficient and workable body of rules has been secured.

There is a tendency to regard every major procedural change as a close approximation of the ultimate; but operation of each system has revealed defects which have become more prominent with the passage of time. Rules of procedure breed technicalities. The Federal Rules of Civil Procedure are no more an eternal solution of procedural problems than were the Hilary Rules. There is a familiar note in this nearly contemporaneous characterization of the Hilary Rules. "The intent of the rules of Hilary term appear to have been, to assimilate the practice of the different courts, and to render the proceedings therein more expeditious, and less expensive to the suitors . . . These rules, which may be considered as the commencement of a new era in pleadings, . . ."

Experience as Teacher

Deficiencies in the new systems of procedure will appear, and they must be remedied as they become apparent. Already in the federal field it seems to be demonstrated that the provision of Rule 12 (e) of the Federal Rules of Civil Procedure, authorizing a motion for a more definite statement or for a bill of particulars, is not functioning satisfactorily. The complication of pleadings by bills of particulars which become part of the pleadings is tending to defeat the provision of Rule 8 which requires a simple, concise and direct allegation of the pleader's claim for relief. The pleader who complies with Rule 8 and files a simple, concise and direct statement in the manner indicated by the illustrative forms which accompany the Rules, is too frequently subjected to a request for amplification of details under Rule 12 (e). The necessity of expanded allegations in pleadings has been diminished by the broad discovery available under the Rules. Motions under Rule 12 (e) coming, as they do, before the answer is filed, postpone the opportunity to move for summary judgment and prevent the taking of depositions except upon the order of the court. The purpose of the more definite statement and the bill of particulars is to give the defendant information necessary "to enable him properly to prepare his responsive pleading or to prepare for trial." And yet in some instances the plaintiff has been required to seek discovery from the defendant in order to acquire knowledge of the particulars which the court, upon motion of the defendant, has required him to supply.

In view of the manner in which Rule 12 (e) is operating, Professor James William Moore, whose intimate connection with the formulation of the Rules is well

*This article is the seventh published in consecutive issues of the JOURNAL in advocacy of the program of the Special Committee on Improving the Administration of Justice.

known, has recommended that Rule 12(e) be eliminated. Disclosure of deficiencies in the operation of a particular rule is in no sense a reflection upon the general excellence of the Federal Rules. Prompt diagnosis and treatment of minor defects as they appear will, however, prevent the need for major surgery in the future.

In the federal field the Administrative Office of the United States Courts is available as an official mechanism for continuous appraisal and adjustment of the Federal Rules. In the local field in Illinois the Civil Practice Section of the Illinois State Bar Association has served as an unofficial clearing house for suggestions of procedural improvement and for the translation of meritorious suggestions into specific proposals. At the district meetings of the State Bar Association held throughout the state during the year, criticisms and suggestions are freely received and discussed. Necessary revisions are drafted and submitted for section and association approval before submission to the General Assembly or the Supreme Court for adoption in the form of statute or rule.

Pending Legislation in Illinois

A bill so drafted and now pending in the General Assembly is illustrative. Many of its provisions are designed to eliminate specific points of difference between state and federal practice. One of its sections will make the summary judgment procedure available to defendants as well as to plaintiffs and will emphasize the availability of the procedure in equitable as well as legal actions. Another section authorizes the formulation by the Supreme Court of a rule which, like Rule 33 of the Federal Rules of Civil Procedure, will authorize the use of interrogatories as an additional means of securing discovery from adverse parties. Rule 41 of the Federal Rules is the source of a provision safeguarding the right of a defendant in equity to offer evidence even though his motion for a finding in his favor, made at the close of the plaintiff's case, is denied.

The formulation by the Supreme Court of a uniform rule governing pre-trial procedure is also authorized, and the adoption of a rule based upon Federal Rule 16 is contemplated. Pre-trial procedure is already effective in many courts of the state under local rules. It is felt that the advantages of uniformity may be secured, and a more widespread use of the device be encouraged, through the formulation of a rule of state-wide application by the Supreme Court.

Another provision of the pending bill authorizes the issuance of declaratory judgments. Thus far, efforts to secure legislative sanction for the use of the declaratory judgment in Illinois have been unsuccessful. Declaratory judgment provisions in the original draft of the Illinois Civil Practice Act and in an amendatory bill submitted in 1937 were removed by amendment in the General Assembly because the threat of opposition from a single powerful and competent legislator threatened to jeopardize the enactment of the entire program unless the declaratory judgment section was eliminated. A similar fate was suffered by a provision of the original Illinois Civil Practice Act concerning special verdicts, which, like Rule 49 of the Federal Rules, was modeled upon the Wisconsin practice.

Other provisions of the pending bill are designed to remove ambiguities and remedy deficiencies which operation under the Act has revealed. This process of continuous appraisal and readjustment is necessary to avoid the accumulation of barnacles and to insure continued smoothness of operation. It may be undertaken by an official or an unofficial agency, although the advantages of official action are persuasive. Such a program does not, of course, contemplate change as an end in itself. It is rather analogous to those public health techniques, which by preventive practices, seek to avoid the necessity for subsequent heroic treatment. Alertness on the part of lawyers to minor procedural irritations can eliminate procedural surgery.

The adoption of satisfactory rules of civil procedure and readjustment of those rules to insure continued effectiveness leave untouched the more spectacular field of criminal procedure. The public is far more sensitive to deficiencies in criminal procedure than to the waste caused by an antiquated system of civil procedure. The responsibility of the bar is the same in either case. And so long as widespread dissatisfaction with the administration of criminal cases exists, the bar will have failed to meet its responsibility.

Criminal Procedure in Illinois

Efforts to improve criminal procedure by legislation in Illinois have thus far been unsuccessful. In 1935 a proposed new criminal code was submitted to the General Assembly. This Code was the product of the State Bar Association and of the Cook County and State Judicial Councils. The bill failed of passage. Redrafted after careful consideration of suggestions which had been made in the legislature and in discussions of the proposed revision throughout the state, it again failed of passage in 1937. It has not been introduced in the present legislative session. As submitted to the General Assembly in 1935 the proposed Code was a comprehensive revision of the statutory substantive and procedural criminal law. The substantive provisions met with almost uniform approval; objections centered upon the procedural provisions. But the separate submission of the substantive portion of the Code in 1937 also failed of enactment. The need for reform of both substantive and procedural criminal law in Illinois has not diminished, and efforts to achieve that reform have not ended. It may be hoped that the formulation of rules of criminal procedure by the advisory committee of the Supreme Court of the United States will supply the impetus needed to bring about the simplification of criminal procedure in Illinois.

REVIEW OF RECENT SUPREME COURT DECISIONS

By EDGAR BRONSON TOLMAN*

State Statutes, Applicability to Acts Committed by Citizens of a State Beyond State Boundaries

The Florida statute forbidding the use of diving equipment in the taking of sponges from the Gulf of Mexico off the coast of Florida, is a valid exercise of state power. A citizen of that state may be prosecuted and convicted for acts prohibited by that statute even though the acts may have been committed beyond the state boundaries.

Skiriotes v. Florida, 85 Adv. Op. 825; 61 Sup. Ct. Rep. 924; U. S. Law Week 4316. (No. 658, decided Apr. 28, 1941.)

A Florida statute forbids the use of deep sea diving apparatus for the purpose of taking commercial sponges from the Gulf of Mexico or the Straits of Florida or other waters within the territorial limits of that state. The indictment charged that appellant was using the forbidden apparatus "at a point approximately two marine leagues from mean low tide on the West shore line of the State of Florida and within the territorial limits of the County of Pinellas." The case was tried in a county court in Pinellas County on a stipulation of facts and without a jury. The trial court held that the Western boundary of Florida was fixed by the state constitution of 1885 at three marine leagues (nine nautical miles) from the shore. Defendant contended that the constitution of Florida fixing the boundary of the state, and the statute under which he was prosecuted, violated the constitution and treaties of the United States; that the criminal jurisdiction of the courts of Florida could not extend beyond the international boundaries of the United States, and hence could not extend to a greater distance than one marine league from mean low tide.

In support of that contention appellant invoked certain recitals in the constitution and in numerous treaties with various countries for the prevention of the smuggling of intoxicating liquors, also diplomatic correspondence with respect to the limits of the territorial waters of the United States. The defendant was found guilty of a breach of the state statute and on appeal to the highest court of the state conviction was affirmed. The defendant appealed and the Supreme Court of the United States affirmed the judgment of the Supreme Court of Florida.

The opinion of the Court was delivered by the CHIEF JUSTICE. The first question was in regard to the status of the appellant and it was declared that, on the record, the Court was justified in assuming that the appellant was a citizen of the United States and of Florida.

With respect to the consequence of appellant's Florida citizenship the CHIEF JUSTICE says:

> "In these circumstances, no question of international law, or of the extent of the authority of the United States in its international relations, is presented. International law is a part of our law and as such is the law of all States of the Union (*The Paquete Habana,* 175 U. S. 677, 700), but it is a part of our law for the application of its own principles, and these are concerned with international rights and duties and not with domestic rights and duties. The argument based on the limits of the territorial waters of the United States, as these are described by this Court in *Cunard Steamship Company* v. *Mellon,* 262 U. S. 100, 122, and in diplomatic correspondence and statements of the political department of our Government, is thus beside the point. For, aside from the question of the extent of control which the United States may exert in the interest of self-protection over waters near its borders, although beyond its territorial limits, the United States is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed. With respect to such an exercise of authority there is no question of international law, but solely of the purport of the municipal law which establishes the duty of the citizen in relation to his own government."

The CHIEF JUSTICE referred to many illustrations of the principles above stated and holds that by an analogy of reasoning the treaties which the appellant cited are inapplicable to his case. On that point he says:

> "For the same reason, none of the treaties which appellant cites are applicable to his case. He is not in a position to invoke the rights of other governments or of the nationals of other countries. If a statute similar to the one in question had been enacted by the Congress for the protection of the sponge fishery off the coasts of the United States there would appear to be no ground upon which appellant could challenge its validity. . . . It is also clear that Florida has an interest in the proper maintenance of the sponge fishery and that the statute so far as applied to conduct within the territorial waters of Florida, in the absence of conflicting federal legislation, is within the police power of the State."

The question then arose whether the statute as applied to citizens of Florida is beyond the competency of that state. Appellant had contended that certain Federal statutes, which forbade the taking of sponges from the waters of the Gulf of Mexico of less than a given size prevented state legislation in that field. It was held, however, that Congress having occupied but a limited field, the authority of the state to protect its interest by additional or supplementary legislation was not impaired. The opinion declares that Florida has an interest in the proper maintenance of sponge fisheries and that in the absence of conflicting Federal legislation, the statute so far as applied to conduct within the territorial waters of Florida is within the police power of the state.

Appellant had invoked the equal protection clause of the 14th amendment and it was overruled on the ground that the statute applies equally to all persons within the jurisdiction of the state.

In answer to appellant's claim that the state had transcended its power because the statute had been applied to appellant's operations outside territorial waters, and that the various treaties and acts of Congress referred to, contained recitals as to state boundaries different from the boundaries set up in the state constitution, the CHIEF JUSTICE declares:

> "But putting aside the treaties, which appellant has no standing to invoke, we do not find it necessary to resolve the conten-

*Assisted by JAMES L. HOMIRE and LELAND L. TOLMAN.

tions as to the interpretation and effect of the Act of Congress of 1868. Even if it were assumed that the *locus* of the offense was outside the territorial waters of Florida, it would not follow that the State could not prohibit its own citizens from the use of the described divers' equipment at that place. No question as to the authority of the United States over these waters, or over the sponge fishery, is here involved. No right of a citizen of any other State is here asserted."

* * *

"If the United States may control the conduct of its citizens upon the high seas, we see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest and where there is no conflict with acts of Congress. Save for the powers committed by the Constitution to the Union, the State of Florida has retained the status of a sovereign. Florida was admitted to the Union 'on equal footing with the original States, in all respects whatsoever.' And the power given to Congress by Section 3 of Article IV of the Constitution to admit new States relates only to such States as are equal to each other 'in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself'."

Reference is made in the opinion to many cases which recognize the doctrine that a state may exercise its authority over its citizens on the high seas, particularly, "the case of *The Hamilton*," 207 U. S. 398, which is perhaps the broadest and strongest statement of the extent of state power. The CHIEF JUSTICE closes his opinion with the following paragraph:

"We are not unmindful of the fact that the statutory prohibition refers to the 'Gulf of Mexico, or the Straits of Florida or other waters within the territorial waters of the State of Florida.' But we are dealing with the question of the validity of the statute as applied to appellant from the standpoint of state power. The State has applied it to appellant at the place of his operations and if the State had power to prohibit the described conduct of its citizen at that place we are not concerned from the standpoint of the Federal Constitution with the ruling of the state court as to the extent of territorial waters. The question before us must be considered in the light of the total power the State possesses . . . "

The case was argued by Mr. W. B. Dickenson for appellant and by Mr. Nathan Cockrell for appellee.

Railroads—Interstate Commerce Commission's Power to Remedy Unjust Discriminations—Discriminations Against Passengers because of Race or Color

A railroad passenger in interstate commerce has the legal right to maintain a complaint with the Interstate Commerce Commission for relief against unjust discrimination by the carrier through its failure to provide, because of his race or color, accommodations equal to those provided for others at the same rate of fare, and may maintain a suit to set aside an order of the Commission denying relief.

A state statute requiring the segregation of white and colored passengers on railroad trains may not lawfully be applied in such manner as to deny to colored passengers traveling in interstate commerce accommodations equal to those provided for white passengers paying the same rate of fare. To permit the statute so to operate would be a violation of the Fourteenth Amendment.

The Interstate Commerce Act confers power on the Commission to give relief against all unjust discriminations, and the relatively small number of colored passengers traveling first class does not justify failure of a carrier to provide for them accommodations equal to those provided for white passengers.

Mitchell v. United States, 85 Adv. Op. 811; 61 Sup. Ct. Rep. 873, U. S. Law Week, 4319, (No. 577, decided April 28, 1941).

This case came before the Court on direct appeal from a specially constituted federal District Court in Illinois. The proceedings originated in a complaint filed with the Interstate Commerce Commission by Arthur W. Mitchell, alleging an unjust discrimination in the furnishing of accommodations to colored passengers on the Rock Island Railway between Chicago and Hot Springs, Arkansas, in violation of Interstate Commerce Act. The Commission dismissed the complaint and the District Court dismissed the appellant's complaint wherein he sought to have the Commission's order set aside.

Among the facts found by the Commission, it appeared that the appellant, a Negro resident of Chicago and a member of Congress, left Chicago for Hot Springs on a journey including travel over the Rock Island Railway between Memphis and Hot Springs. After leaving Memphis he was directed to leave a Pullman car seat, for which he had tendered payment, and to move in to the car provided for colored passengers. This was in purported compliance with an Arkansas statute requiring segregation of colored persons from white persons by the use of cars or partitioned sections providing "equal, but separate and sufficient accommodations for both races." It further appeared that the Pullman car was of a first class quality with the customary accommodations and facilities. However, the coach for colored passengers was inferior to the Pullman car in respect of its age, quality and accommodations, and according to the appellant was "filthy and foul smelling," though the railroad's witnesses testified to the contrary.

In reaching its conclusion the Commission felt that it must recognize the state law requiring segregation of colored passengers and emphasized that, as there was comparatively little colored traffic to require dining-car and observation-parlor car accommodations for colored passengers, the discrimination was not unjust. The Commission observed that it was only differences of treatment constituting unjust discriminations that are unlawful and within its power to remove.

Five Commissioners dissented from the dismissal of the appellant's complaint. The United States was a party to the suit to set aside the order, but did not support the judgment of the District Court. On an appeal the Supreme Court unanimously reversed the decree of the District Court in an opinion by the CHIEF JUSTICE. He first considers the Commission's challenge to the standing of the appellant to bring the suit, and reaches the conclusion that the appellant may maintain a suit to set aside the order.

Then passing to the merits, the opinion observes that there was manifestly a discrimination in the course of an interstate journey and that the discrimination was based solely on the fact that the appellant was a Negro. This question is declared to be one of equality of treatment rather than merely one of segregation. Commenting on this aspect of the case and citing a relevant position of the Interstate Commerce Act, the Court says:

"The question whether this was a discrimination forbidden by the Interstate Commerce Act is not a question of segregation but one of equality of treatment. The denial to appellant of equality of accommodations because of his race would be

an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment . . . and in view of the nature of the right and of our constitutional policy it cannot be maintained that the discrimination as it was alleged was not essentially unjust. In that aspect it could not be deemed to lie outside the purview of the sweeping prohibitions of the Interstate Commerce Act.

"We have repeatedly said that it is apparent from the legislative history of the Act that not only was the evil of discrimination the principal thing aimed at, but that there is no basis for the contention that Congress intended to exempt any discriminatory action or practice of interstate carriers affecting interstate commerce which it had authority to reach. . . . Paragraph 1 of Section 3 of the Act says explicitly that it shall be unlawful for any common carrier subject to the Act "to subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." . . . From the inception of its administration the Interstate Commerce Commission has recognized the applicability of this provision to discrimination against colored passengers because of their race and the duty of carriers to provide equality of treatment with respect to transportation facilities; that is, that colored persons who buy first-class tickets must be furnished with accommodations equal in comforts and conveniences to those afforded to first-class white passengers."

The Court also commented on the Commission's action as being influenced by the fact that there was comparatively little colored traffic. This fact the Court considers legally irrelevant. As to this MR. CHIEF JUSTICE HUGHES says:

"But the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment, a right specifically safeguarded by the provisions of the Interstate Commerce Act. We thought a similar argument with respect to volume of traffic to be untenable in the application of the Fourteenth Amendment. We said that it made the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of that right is that it is a personal one. . . . While the supply of particular facilities may be conditioned upon there being a reasonable demand therefor, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual, we said, who is entitled to the equal protection of the laws,—not merely a group of individuals, or a body of persons according to their numbers. . . . And the Interstate Commerce Act expressly extends its prohibitions to the subjecting of 'any particular person' to unreasonable discriminations."

The case was argued by Mr. Arthur W. Mitchell and Mr. Richard E. Westbrooks for appellant; by Mr. J. Stanley Payne for I.C.C.; by Mr. Wallace T. Hughes for Frank O. Lowden et al, trustees; and submitted by Mr. Solicitor General Biddle, Mr. Warner W. Gardner, and Mr. Frank Coleman for the United States.

State Income Taxation—the Indiana Gross Income Tax Law

An Indiana corporation engaged in the business of enameling metal parts made and sold by other manufacturers, is engaged in intrastate activities and is subject to the income tax laws of that state. If the value of services rendered to non-resident customers is to be deducted from total earnings, application must first be made to the state taxing authorities for allowance of a reduction. (*Gwin v. Henneford*, 305 U. S. 434 distinguished.)

Department of Treasury of the State of Indiana, et al v. Ingram-Richardson Manufacturing Company of Indiana, Inc., 85 Adv. Op. —, 61 Sup. Ct. Rep. 866, U. S. Law Week, 4324. (No. 655, decided May 5, 1941.)

Respondent, an Indiana corporation, manufactures and applies enamel to metal articles. The work is done in Indiana for customers in that and other states on orders taken by its traveling salesmen. The articles to be enameled are shipped to the Indiana factory, and after the enameling is completed they are returned to the various customers.

The State Treasury Department contended that the proceeds of the enameling business were income subject to the state income tax. The enameler claimed that the transactions constituted sales of the enamel in interstate commerce or in the alternative that the service paid for included the solicitation of orders by respondent's agents and the execution of contracts and delivery of parts in other states.

The corporation paid the tax and brought suit in the federal district court for the refund of the tax. That court held the corporation entitled to the refund, its judgment was affirmed by the Circuit Court of Appeals. Certiorari was allowed because of alleged conflict with applicable decisions of the Supreme Court. That court reversed the judgment of the Circuit Court of Appeals and ordered the case remanded to the district court for further proceedings in conformity with its opinion.

The opinion was delivered by the CHIEF JUSTICE.

Some preliminary questions were first disposed of. The opinion declares that "the fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity."

The lower court held that there was included in the service rendered by the enameler, transportation by trucks to and from other states and that under the reasoning of *Gwin v. Henneford* (305 U. S. 494) the enameler was not subject to state income taxation. The CHIEF JUSTICE points out the distinctions between the facts in the *Gwin* case and those in the case at bar, namely, that the business of a marketing agent for a federation of fruit growers, measured by the gross receipts of the taxpayers, although there was included in those gross receipts, service in aid of the shipment and sale is to be distinguished from cases where, as in the instant case "the entire service was in aid of the enameling business conducted within the state."

It is further suggested that even if the transportation of the articles were to be regarded as an item of service for which a deduction should have been allowed, it was the duty of the one engaged in the conduct of an intrastate business subject to state taxation to show the amount which should be allowed and claim its deduction. Since the respondent claimed total exemption from the tax on the ground that it was allowed on interstate sales, the Court finds itself unable to consider the matter of deductions. On this point the Court said:

"In the absence of an effort on the part of respondent to present a claim for deduction and to have the state authorities pass upon the question of deduction or apportionment, as distinguished from its claim of a total exemption, we are not called upon to attempt to resolve the question of state law."

Joseph P. McNamara, Deputy Attorney General of Indiana, argued the case for petitioners; Earl B. Barnes argued the case for respondent.

State Taxation—Indiana Gross Receipts Tax—Interstate Commerce

Dept. of Treasury, Indiana v. Wood Preserving Corp., 85 Adv. Op. 817, 61 Sup. Ct. Rep. 885, U. S. Law Week, 4315. [No. 654, decided April 28, 1941.]

Certiorari was granted to review a judgment of the circuit court, holding invalid for jurisdictional and constitutional reasons, taxes levied by the State of Indiana under its Gross Income Tax Act of 1933 upon a foreign corporation with principal offices in Pittsburgh and engaged in the business of purchase, sale, and treatment of railroad ties, on account of gross income received by it from the sale of ties to the Baltimore and Ohio Railroad in accordance with two contracts for sale of ties to the railroad and their treatment by the taxpayer at its plants in Ohio and West Virginia.

The opinion of the Court by MR. CHIEF JUSTICE HUGHES describes the course of business in some detail. The taxpayer produced no ties in Indiana. Requisitions for them were issued from the railroad offices in Maryland, and accepted at the taxpayer's office in Ohio by telephone or mail. The taxpayer procured ties from Indiana producers by telephone or mail, and the producers made deliveries at loading points on the railroad in Indiana. An inspector of the railroad and an agent of the taxpayer met at these points and examined the ties. Those accepted by the railroad inspector were then immediately loaded on the railroad's cars and payment was made only for ties thus accepted. The ties were then carried without charge to the taxpayer's Ohio plant for treatment. Payment for all ties was made at the taxpayer's bank in Pittsburgh.

The opinion concludes that the circuit court of appeals was in error. That court had held that under the statute, the thing taxed was "the receipt of gross income," and as the income was received in Pennsylvania, it was beyond the jurisdiction of Indiana, and that, even if the tax was not a tax on gross income, but was only upon income "derived from sources within the State of Indiana," still the tax was invalid because there was no method for allocating the tax to Indiana income, and the transactions were in interstate commerce against which the tax discriminated.

The opinion concludes that the tax in this case is laid upon receipts from sources within the state, from activities that were intrastate, and that the state therefore had authority to levy it. It also points out that since the receipts from sale of ties in Indiana are the only receipts taxed, there is no occasion for apportionment. The heart of the opinion is stated in the following paragraph:

> "As to these dealings, it appears that respondent received in Indiana the ties it purchased from the local producers and that respondent sold and delivered these ties in Indiana to the Railroad Company. The fact that the delivery by the producers to respondent and respondent's delivery to the Railroad Company took place at the same time is not important. Respondent was in Indiana acting through its agent at the designated points on the railroad line. The Railroad Company was at the same points represented by its inspector. The ties brought there by the producers were then examined and those found by the inspector to be in accordance with specifications were accepted. In these transactions, respondent through its agent at once accepted from its vendors the ties which the Railroad Company found satisfactory and then and there sold and delivered these ties to the Railroad Company. These were local transactions,—sales and deliveries of particular ties by respondent to the Railroad Company in Indiana. The transactions were none the less intrastate activities because the ties thus sold and delivered were forthwith loaded on the railroad cars to go to Ohio for treatment. The contract providing for that treatment called for the treatment of ties to be delivered by the Railroad Company at the Ohio plant, and the ties bought by the Railroad Company in Indiana, as above stated, were transported and delivered by the Railroad Company to that treatment plant. Respondent did not pay the freight for that transportation and the circumstance that the billing was in its name as consignor is not of consequence in the light of the facts showing the completed delivery to the Railroad Company in Indiana."

The case was argued on April 1, 1941, by Mr Joseph P. McNamara and Mr. Joseph W. Hutchinson for petitioners and by Mr. Harry T. Ice for respondent.

Federal Procedure—Removal—Counterclaims

A non-resident plaintiff in a state court against whom the defendant files a counterclaim separate and distinct from the plaintiff's claim, may not remove the case to a federal district court. The mere fact that the plaintiff defends the counterclaim does not make him a defendant within the meaning of the removal statute.

Shamrock Oil & Gas Corporation v. Sheets, 85 Adv. Op. 836; 61 Sup. Ct. Rep. 868; U. S. Law Week, 4312. (No. 727, decided Apr. 28, 1941.)

A citizen of Texas who had been sued in a court of that state by a non-resident corporation, filed a counterclaim for more than $3,000 against the non-resident plaintiff. For brevity the parties will be called respectively "plaintiff" and "defendant" as they were in the original suit. The counterclaim was separate and distinct from the plaintiff's claim. The plaintiff in the state court removed the action to the United States District Court for Northern Texas on the ground of diversity of citizenship. Defendant moved to remand. His motion was denied and after trial on the merits the district court gave judgment for the plaintiff below, both on its original claim and on the counterclaim. The judgment of the district court was reversed by the Circuit Court of Appeals, Fifth Circuit. Plaintiff's petition for certiorari was granted because of conflicting decisions in the circuit courts. The decision of the circuit court was affirmed. The opinion of the Court was delivered by MR. JUSTICE STONE.

The decision is confined to the question of statutory construction raised by the plaintiff in its petition for certiorari.

Plaintiff claimed that although nominally a plaintiff in the state court, it was in point of substance a defendant to the counterclaim asserted against it, upon which under Texas procedure, judgment could go against the plaintiff in the full amount demanded, but the court calls attention to the fact that the decision turns upon the meaning of the removal statute and not upon the characterization of the suit or the parties by state statutes or decisions. With regard to that statute MR. JUSTICE STONE says:

"The removal statute which is nationwide in its operation, was intended to be uniform in its application, unaffected by local law definition or characterization of the subject matter to which it is to be applied. Hence the Act of Congress must be construed as setting up its own criteria, irrespective of local law, for determining in what instances suits are to be removed from the state to the federal courts."

The statute here involved, Section 28 of the Judicial Code, authorizes removal of the suits to which it applies "by the defendant or defendants therein." That statute during the period from 1875 to 1887 specifically gave to either party the privilege of removal but at all other periods the statutes governing removals have given the privilege of removal to "defendants alone" with a single exception where the removal is based upon the grounds of prejudice and local influence.

The opinion reviews the applicable statutes from 1789 to date and calls attention to the fact that by Section 3 of the Act of 1875 the practice on removal was greatly liberalized and that until the amendment of 1878, either party could remove but that by the act of 1887 which now controls, the right has been again limited to defendants. In view of this history MR. JUSTICE STONE declares:

"We cannot assume that Congress, in thus revising the statute, was unaware of the history which we have just detailed, or certainly that it regarded as without significance the omission from the earlier act of the phrase 'either party,' and the substitution for it of the phrase authorizing removal by the 'defendant or defendants' in the suit, or the like omission of the provision for removal at any time before the trial, and the substitution for it of the requirement that the removal petition be filed by the 'defendant' at or before the time he is required to plead in the state court."

These alterations are declared to be of controlling significance.

The opinion reviews the decisions interpreting the act in its various forms and concludes as follows:

"Not only does the language of the Act of 1887 evidence the Congressional purpose to restrict the jurisdiction of the federal courts on removal, but the policy of the successive acts of Congress regulating the jurisdiction of federal courts is one calling for the strict construction of such legislation. The power reserved to the states under the Constitution to provide for the determination of controversies in their courts, may be restricted only by the action of Congress in conformity to the Judiciary Articles of the Constitution. 'Due regard for the rightful independence of state governments which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined'."

The case was argued by Mr. W. M. Sutton for petitioner and by Mr. E. Byron Singleton for respondents.

Interstate Commerce—Sales Taxes

The Virginia statute which imposes an annual state license tax of $100 per vehicle used in the business, on peddlers and those (with certain exceptions) who sell and deliver goods at other than at a definite place of business operated by the seller, does not contravene the commerce clause or the equal protection clause of the Federal Constitution.

Caskey Baking Co. v. Virginia, 85 Adv. Ops. 831; 61 Sup. Ct. Rep. 881; U.S. Law Week, 4311. (No. 676, decided Apr. 28, 1941.)

A West Virginia corporation engaged in baking and selling bread and maintaining its principal office in Martinsburg of that state, and selling its products to retailers in territory adjacent to Martinsburg, trucked its bread into Virginia and sold it to regular customers there. The corporation had no property permanently located in Virginia and operated no "definite place of business" there, but in compliance with the statute of that state it maintained an office for auditing and paying claims. It was registered in Virginia as a foreign corporation, paid an annual registration fee and an income tax on its net profit allocable to its Virginia business.

It was convicted and fined for making a sale in Virginia without having procured a license pursuant to provisions of the Tax Code of Virginia. The conviction was affirmed by the Virginia Supreme Court of Appeals, and on appeal the Supreme Court of the United States affirmed the judgment of the Virginia Supreme Court.

The opinion of the Court was delivered by MR. JUSTICE ROBERTS.

He analyzed and defined the challenged statute as one which imposes an annual state license tax on every one who peddles merchandise by selling and delivering the same to licensed dealers or retailers otherwise than from a definite place of business operated by the seller. The annual fee is computed at $100 for each vehicle used in the business.

There were certain exceptions in the statute but it was conceded that appellant was not within any of them. The opinion points out that appellant challenged the statute as contravening the commerce clause and the equal protection clause of the federal Constitution and that the grounds of the challenge were that the appellant was either engaged in interstate business which the state might not burden by imposing a license tax or that it was engaged in an intrastate business, as to which the exaction works a forbidden discrimination. Both contentions were held untenable. As to the matter of interstate commerce, MR. JUSTICE ROBERTS says:

"While the transportation of bread across the State line is interstate commerce, that is not the activity which is licensed or taxed. The purely local business of peddling is what the Act hits, and this irrespective of the source of the goods sold. It is settled that such a statute imposes no burden upon interstate commerce which the Constitution interdicts. The appellant, however, urges that the Act discriminates against interstate commerce by exempting from its operation the privilege of sales by manufacturers paying tax on their capital employed in manufacture in Virginia. It is said that if its bakery were situated in Virginia the appellant would have the benefit of this exemption and, since it is not, the marketing of appellant's goods shipped into the State is the target of a hostile discrimination. But the argument overlooks the fact that peddlers resident in Virginia who buy their goods within the State, or buy or procure them from extra-state sources, are alike subject to the Act. The contention that the Act discriminates against interstate commerce by virtue of the exemption in question is negatived by our decisions."

As to the second ground of attack, namely that the statute works a discrimination against the business of appellant if it be regarded as intrastate business, MR. JUSTICE ROBERTS says:

"Examination of the Tax Code of Virginia discloses that the Act in question is but one portion of a comprehensive scheme of taxation. Manufacturers who sell their own products pay a tax on capital, which the State deems sufficient to cover all their activities, including the vending of the goods. Wholesale mer-

chants who have a fixed place of business pay a license tax measured by a percentage of all their purchases; and if they are also licensed by the town or city in which they have their place of business or, in lieu thereof, are taxed by such town or city on the capital employed in the business, they may sell and deliver at the same time and place anywhere in the State without payment of any additional license tax. Every distributing house, whether operated by a manufacturer or wholesaler for distributing goods amongst the owner's retail stores must be licensed and pay the same tax as if it were a wholesaler. Retail merchants and peddlers at retail must be licensed and pay license taxes—the former a percentage of the value of his purchases and the latter a fixed annual fee. Those who have no fixed place of business, who peddle their wares only to licensed dealers or retailers at the places of business of the latter, fall into none of the described classes. As the court below points out, were it not for §192b, such peddlers would be the only vendors in Virginia to escape some form of taxation.

"Peddlers at wholesale are not entitled to be licensed and taxed on the same basis as other vendors, as respects either form or amount. As we have repeatedly held, the equal protection clause of the Fourteenth Amendment does not prevent a state from classifying businesses for taxation or impose any iron rule of equality. Some occupations may be taxed though others are not. Some may be taxed at one rate, others at a different rate. Classification is not discrimination. It is enough that those in the same class are treated with equality. That is true here."

The case was argued by Mr. R. Gray Williams and Mr. Clarence E. Martin for appellant and by Mr. Abram P. Staples, Attorney General of Virginia, for appellee.

Railroad Reorganizations—Power of Bankruptcy Court to Determine Amount and Legality of Taxes

In proceedings under Section 77 of the Bankruptcy Act, the bankruptcy court is without power to determine *de novo* the amount and legality of taxes on the debtor's property, which had been assessed on a valuation duly made by the state taxing authorities acting in accordance with the constitutional procedure prescribed by the state law.

Arkansas Corporation Commission v. Thompson, 85 Adv. Op. 801; 61 Sup. Ct. Rep. 888, U. S. Law Week, 4308 (No. 715, decided April 28, 1941).

The respondent, trustee in bankruptcy of the Missouri Pacific Railroad Company, brought a petition in the bankruptcy court to determine the "amount or legality" of taxes levied on the railroad's property in Arkansas. The State Corporation Commission had previously determined the value for tax assessment for 1939 in conformity with procedure prescribed by state law, and no question was raised as to procedural regularity of the Commission's action. After the expiration of the time allowed for an appeal from the Commission's order, the railroad trustee filed his petition in the bankruptcy court, invoking Section 64 (a) of the Bankruptcy Act as the legal basis for his petition.

That section provides:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates . . . shall be . . . (4) taxes legally due and owing by the bankrupt to the United States or any state . . .: Provided, . . . That, in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the (bankruptcy) court. . . ."

In railroad reorganization proceedings the jurisdiction and power of the court, consistent with the provisions of Section 77, are made the same as in ordinary voluntary proceedings.

The District Court held that it had jurisdiction to entertain the trustee's petition and the Circuit Court of Appeals affirmed. On certiorari the judgment was reversed by the Supreme Court in an opinion by Mr. Justice Black.

The petitioners contended that Section 64 (a) is inconsistent with the aims and purposes of Section 77 and hence inapplicable here. This question the Supreme Court found unnecessary to decide, since it was of the opinion that the language does not confer the asserted power. As to this the opinion states:

"For we are of opinion that the Constitutional language giving to the bankruptcy court power to determine the 'amount or legality' of taxes does not mean that the court is given power to redetermine and revise the property value finally fixed by a state under the circumstances revealed by the trustee's petition, even though that value is the basis used in computing the amount of taxes 'legally due and owing'."

The opinion also enumerates the grounds on which the bankruptcy court was asked to find the Commission's assessment illegal, namely, (1) that the value by the Board was greatly in excess of market value and the violation of the Arkansas law; (2) that the assessment violated Section 5 of Article 16 of the State Constitution prescribing equality and uniformity of taxation; and (3) that the excessive valuation violated the Fourteenth Amendment.

Mr. Justice Black observes that these contentions assume that Section 64 (a) (4) empowers the bankruptcy court to hold a hearing *de novo* to fix its own value on the property irrespective of the value fixed by the state through its duly constituted agency.

Rejecting this interpretation the Court says:

"But we do not so interpret Section 64 (a) (4). What Section 64 (a) (4) relates to is 'taxes legally due and owing by the bankrupt.' And what that section further provides is that 'in case any question arises as to the amount or legality of any taxes, such question shall be heard and determined by the court; . . .' Nothing in this language indicates that taxpayers in bankruptcy or reorganization are intended to have the extraordinary privilege of two separate trials, one state and one federal, on an identical issue of controverted fact—the value of the property taxed. Manifestly, whether or not taxes are 'legally due and owing' to a state depends upon the valid laws of that state. Ad valorem taxes depend upon a determination of value. The governmental function of fixing the value for tax purposes has rarely, if ever, been a judicial function. The 'legality' of the action of Arkansas in entrusting the determination of value to its Corporation Commission is not challenged here, as of course it could not be. If the Commission properly found the value of the property, the 'amount' of the taxes is not in question. For it is not asserted that the Commission made an improper arithmetical computation in applying the legal tax rate to the determined property value."

In conclusion the opinion declares that the contention of the railroad trustee, if sustained here, would work a complete reversal of our historic national policy of federal non-interference with the taxing power of the states.

Mr. Justice Douglas did not participate.

The case was argued by Mr. Joseph M. Hill and Mr. Leffel Gentry for the petitioners, and by Mr. James M. Chaney for the respondent.

National Labor Relations Act—Discrimination in Hiring on Account of Union Activities—Remedies

An employer subject to the National Labor Relations Act may not refuse to hire employees solely because of their affiliations with a labor union.

If the National Labor Relations Board finds such discrimination it may order the employer to undo the wrong by offering opportunity for employment which should not have been denied. The Board's power thus to order reemployment extends even to cases in which the men discriminated against have obtained "substantially equivalent employment," but in applying this remedy, the Board must make a finding which will clearly indicate that it has exercised its discretion and, on the facts of the particular case, has determined that by this action it will effectuate the policy of the National Labor Relations Act.

Phelps Dodge Corp. v. NLRB, and *NLRB v. Phelps Dodge Corp.* 85 Adv. Op. 753, 61 Sup. Ct. Rep. 845, U.S. Law Week 4293. [Nos. 387, 641, decided April 28, 1941.]

These cases came to the Court on writs of certiorari to the Circuit Court for the Second Circuit to review a judgment of that court enforcing with modifications an order of the National Labor Relations Board arising out of a strike of the International Union of Mine, Mill and Smelter Workers in 1935. The basis of the order was a finding that the company had refused employment to a number of men because of their affiliation with the union. Two of these men had been in the company's employ and ceased that employment before the strike, but sought employment after its close. The others were strikers. The Board found that the employer had committed an unfair labor practice under § (3) of the National Labor Relations Act, and, to effectuate the policies of the Act, it ordered the employer to offer jobs to the two former employees who sought employment after the strike, and to make them whole for the loss of pay resulting from refusal to hire them. The strikers were ordered reinstated with back pay.

The court of appeals modified and enforced the order as to the strikers, but struck down the provisions relating to the two men seeking employment.

The Court's opinion by MR. JUSTICE FRANKFURTER first examines the question whether discrimination in hiring employees on account of union affiliation is a practice condemned by § 8(3) of the Act.

> "'The practices condemned 'are strictly limited to those enumerated in section 8.' . . . Section 8(3) is the foundation of the Board's determination that in refusing employment to the two men because of their union affiliations Phelps Dodge violated the Act. . . . The prohibition against 'discrimination in regard to hire' must be applied as a means towards the accomplishment of the main object of the legislation. We are asked to read 'hire' as meaning the wages paid to an employee so as to make the statute merely forbid discrimination in one of the terms of men who have secured employment. So to read the statute would do violence to a spontaneous textual reading of § 8(3) in that 'hire' would serve no function because, in the sense which is urged upon us, it is included in the prohibition against 'discrimination in regard to . . . any term or condition of employment.' Contemporaneous legislative history, and, above all, the background of industrial experience forbid such textual mutilation."

In touching briefly on the constitutionality of this interpretation of the Act, the opinion says:

> "We have already recognized the power of Congress to deny an employer the freedom to discriminate in discharging. So far as questions of constitutionality are concerned we need not enlarge on the statement of Judge Learned Hand in his opinion below that there is 'no greater limitation in denying him [the employer] the power to discriminate in hiring than in discharging.' The course of decisions in this Court since *Adair v. U.S.*, 208 U.S. 161, and *Coppage v. Kansas*, 236 U.S. 1, have completely sapped those cases of their authority."

The remedial power of the Board is next discussed, on this point the opinion says:

> "The powers of the Board as well as the restrictions upon it must be drawn from § 10(c), which directs the Board 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this act.' It could not be seriously denied that to require discrimination in hiring or firing to be 'neutralized,' by requiring the discrimination to cease not abstractly but in the concrete victimizing instances, is an 'affirmative action' which 'will effectuate the policies of this Act.' Therefore, if § 10(c) had empowered the Board to 'take such affirmative action as will effectuate the policies of this Act,' the right to restore to a man employment which was wrongfully denied him could hardly be doubted. . . . To differentiate between discrimination in denying employment and in terminating it, would be a differentiation not only without substance but in defiance of that against which the prohibition of discrimination is directed.
>
> "But, we are told, this is precisely the differentiation Congress has made. It has done so, the argument runs, . . . by empowering the Board 'to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.' To attribute such a function to the participial phrase introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. The word 'including' does not lend itself to such destructive significance."

The third major point of the opinion consists of a concurrance with the circuit court that the discrimination found by the Board against the strikers on account of union activities may be neutralized by orders for reinstatement, in view of the holding that such orders are valid even as to men seeking new employment.

The fourth major point of discussion concerns the question whether the Board has power to order employment when the men discriminated against had obtained "substantially equivalent employment." As to this the Board had held that no such employment had been obtained, but that, even if it had, the men should be offered employment. The circuit court holding on this point was to the effect that employment need not be offered workers who had obtained such other employment, and it remanded the case to the Board to make findings. MR. JUSTICE FRANKFURTER refers to the provision of § 10(c) of the Act, authorizing the Board to take such affirmative action including "reinstatement of employees" with or without back pay, as will effectuate the policy of the Act, and of § 2(3), which defines an employee as follows:

> "The term 'employee' shall include any employee and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment.'

It had been argued that the power of the Board to order employment in this situation should be denied

because the definition in § 2(3) of an employee as a person who has not obtained any regular and substantially equivalent employment, is applicable to the words "reinstatement of employees" in section 10(c). The opinion rejects this argument, in part as follows:

"But this is a bit of verbal logic from which the meaning of things has evaporated. In the first place, we have seen that the Board's power to order an opportunity for employment does not derive from the phrase 'including reinstatement of employees with or without back pay,' and is not limited by it. Secondly, insofar as any argument is to be drawn from the reference to 'employees' in § 10(c), it must be noted that the reference is to 'employees' unqualified and undifferentiated. To circumscribe the general class, 'employees,' we must find authority either in the policy of the Act or in some specific delimiting provision of it.

"Not only is the Act devoid of a comprehensive definition of 'employee' restrictive of § 10(c) but the contrary is the fact. The problem of what workers were to be covered by legal remedies for assuring the right of self-organization was a familiar one when Congress formulated the Act. The policy which it expressed in defining 'employee' both affirmatively and negatively, as it did in § 2(3), had behind it important practical and judicial experience. . . .

"To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine the 'policies of this Act' to the correction of private injuries. The Board was not devised for such a limited function. . . . But to limit the significance of discrimination merely to questions of monetary loss to workers would thwart the central purpose of the Act, directed as that is toward the achievement and maintenance of workers' self-organization. That there are factors other than loss of wages to a particular worker to be considered is suggested even by a meager knowledge of industrial affairs. Thus, to give only one illustration, if men were discharged who were leading efforts at organization in a plant having a low wage scale, they would not unnaturally be compelled by their economic circumstances to seek and obtain employment elsewhere at equivalent wages. In such a situation, to deny the Board power to wipe out the prior discrimination by ordering the employment of such workers would sanction a most effective way of defeating the right of self-organization."

The remaining portions of this fourth major division of the opinion discuss the administrative technique to be followed by the Board in applying its power to order employment when equivalent employment has been obtained. The opinion points out that the remedy is not automatic, and that the application of particular remedies to particular situations is left to the Board, subject to limited judicial review, which imposes upon the Board the responsibility of exercising its judgment in employing the statutory powers.

The fifth major division of the opinion deals with the question of whether the Board was empowered to include in the back pay which it ordered the employer to pay to the workers denied employment, amounts which the workers had "failed without excuse to earn." The circuit court had made these deductions and modified the order accordingly. The opinion finds that these deductions should be allowed, but concludes that they should not be made by the circuit court, but should have been left to the Board for determination. The following are excerpts from the opinion on this question.

"Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces. Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.

"But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness. Here again we must avoid the rigidities of an either-or-rule. The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act. . . . The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. . . .

"But though the employer should be allowed to go to proof on this issue, the Board's order should not have been modified by the court below. The matter should have been left to the Board for determination by it prior to formulating its order and should not be left for possible final settlement in contempt proceedings."

Finally, the opinion concludes that other minor objections to the order are without substance, and it orders the decree of the circuit court to be modified accordingly.

MR. JUSTICE ROBERTS did not participate.

MR. JUSTICE MURPHY, joined by MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS, filed a separate opinion indicating the view that the order of the Board should have been affirmed in full. This opinion approves of the disposition made by MR. JUSTICE FRANKFURTER of the first three points which he discussed, but shows an inability to agree with the direction to the Board to modify its order of reinstatement as directed in the fourth part of the opinion, or with the limitation imposed in the fifth part upon the Board's power to make back pay awards. On the first point of disagreement MR. JUSTICE MURPHY observes that the sole reason for challenging this part of the order is that its statement and references are said to demonstrate that the Board ordered reinstatement mechanically due to a misconception of its functions under the statute and that it did not consider whether reinstatement would effectuate the policies of the Act. The opinion states the view that even assuming that this is an inaccurate appraisal of the Board's powers, modification of the order is not a necessary consequence since the sole question is whether the order issued was within the Board's power.

The opinion then examines the record and finds there a number of references to indicate that the Board gave consideration to the question whether, in the exercise of its discretion, reinstatement and employment should be ordered.

"The Board carefully followed the precise procedure which this Court says it should have adopted. It found that the employees in question had been the victims of unfair labor practices. It also found that the policies of the Act would be effectuated by ordering their reinstatement. Since there was evidence to support these findings, it is difficult to understand what more the Board should or could have done."

The opinion then considers whether in the abstract the Board was correct in its opinion that it might be

empowered to order reinstatement, without regard to the substantial equivalency of employment. On this point MR. JUSTICE MURPHY is nevertheless unable to agree that the order should be modified. He finds nothing in § 10(c) or in the Act as a whole to require the Board to consider the substantial equivalency of other employment before ordering reinstatement, and he points out the administrative inconvenience of such a rule.

> "Practical administrative experience may convince the Board that the self-interest of the employees is a far better gauge of the substantial equivalency of his other employment than any extended factual inquiry of its own. Conversely, the Board may conclude that the policies of the Act are best effectuated by an investigation in every case into the nature of his other employment. That choice of rules is an exercise of discretion which Congress has entrusted to the Board. Whichever rule the Board adopts, it does not follow that reinstatement becomes a remedy which is granted automatically upon a finding of unfair labor practices. If for other reasons the Board finds that the policies of the Act will not be effectuated, of course it not only could but should decline to order an offer of reinstatement."

The second point of disagreement with the Court is then discussed. MR. JUSTICE MURPHY questions the power of the Court to substitute its judgment for that of the Board on the question whether "willfully incurred" losses should be deducted from the back pay awards. He observes that the Board found that the policies of the Act would be effectuated by ordering the employer to make whole those employees who were victims of discriminatory practices, that it is permissible to infer from the evidence that there were no "willfully incurred" losses and, this being so, there is no occasion to decide what the Board should have done if it had drawn another inference. Again, looking at the abstract issue, the opinion finds nothing in the Act to require limitation on the Board's authority to award back pay, and expresses the belief that the Court should not interfere with the Board's discretion in this regard.

> "The Board might properly conclude that the policies of the Act would best be effectuated by refusing to embark on the inquiry whether the employees had willfully incurred losses. Administrative difficulties engendered by a contrary rule would be infinite, particularly as the number of individuals involved in the dispute increased. Underlying the contrary rule is the supposition that the employee would purposely remain idle awaiting his back pay award. But that attributes to the employee an omniscience frequently not given to members of the legal profession. He must be able to determine that the employer actually has committed unfair labor practices; that the unfair labor practices affect commerce within the meaning of §§ 2(6) and 2(7); that the Board will take favorable action and make a back pay award; that the Circuit Court of Appeals will enforce that order in full; and that this Court finally will affirm if the case comes here.
>
> "This is not all. He must have capital sufficient to provide for himself and for any dependents while he awaits the back pay award, even though that may not come until several years later. He must risk union disfavor by dividing his efforts between a labor dispute and a search for a new job. He must realize, although his natural suppositions are otherwise, that he will probably not endanger seniority rights or chance of reinstatement by accepting other employment. He must be able to decide when he has made sufficient efforts to secure other employment notwithstanding that he is not told whether he can or must accept any job no matter where it is or what type of employment, wages, hours, or working conditions.
>
> "At his peril he must determine all these things because conventional common law concepts and doctrines of damages, applicable in suits to enforce purely private rights, are to be imported into the National Labor Relations Act.
>
> "Having these considerations in mind, supplemented perhaps by others not available or suggested to us, the Board might well decide that the rule disapproved here would best effectuate the policies of the Act. I do not think we should substitute our judgment on this issue for that of the Board."

MR. JUSTICE STONE, joined by the CHIEF JUSTICE, also filed a separate opinion. It is their view, first, that Congress excluded from the Board's power to reinstate wrongfully discharged employees any authority to reinstate those who have obtained any other regular and substantially equivalent employment; second, that Congress has not clearly authorized the Board to order the employer to hire applicants for work who have never been in his employ or compel him to give them any back pay. The opinion restates the view that the authority of the Act is remedial, not punitive and that this purpose is emphasized by the provisions in § 2(3) that the term "employee" includes employees whose work has ceased as a result of a labor dispute or unfair labor practice and who have not obtained other equivalent employment.

The opinion states recognition of the rule that the policy of a statute is an important factor in interpreting its command, but points out that:

> "It is the policy of the Act and not the Board's policy which is to be effectuated, and in the face of so explicit a restriction of the definition of discharged employees to those who have not procured equivalent employment, we can only conclude that Congress has adopted the policy of restricting the authorized 'reinstatement of employees' to that class."

Examining § 2(3) in a distributive sense, MR. JUSTICE STONE still finds it difficult to say that the specially granted power to reinstate extends to those who are by definition not employees.

The opinion then agrees that since the majority of the Court is of opinion that the Board may order reinstatement even when other equivalent employment has been obtained, the case should be remanded to the Board to determine whether in this case reinstatement will further the Act's purposes. It also notes agreement with the Board's conclusion that the employer's failure to hire two applicants for jobs because of union membership was an unfair labor practice under § 8(3) of the Act, even though they were never employed by the employer, and that the Board could order that practice stopped and enforce its order under § 11, but it disagrees on the power of the Board to order the employer to hire applicants who were never in his employ and to give them back pay. On this, the opinion says:

> "In view of the traditional reluctance of courts to compel the performance of personal service contracts it seems at least doubtful whether an authority to the Board to take affirmative action could, without more, fairly be construed as permitting it to take a kind of affirmative action which had very generally been thought to be beyond the power of courts. This is the more so because the Board's orders were by § 10(c) made subject to review and modification of the courts without any specified restriction upon the exercise of that authority.
>
> "It is true that . . . this Court had held that upon contempt proceedings for violation of a decree enjoining coercive measures

by the employer against his union employees, a court could properly direct that the contempt be purged on condition that the employer restore the status quo. But Congress in enacting the National Labor Relations Act took a step further by providing that the Board could order reinstatement of employees even though there had been no violation of any previous order of the Board or of a court. It thus removed the doubt which would otherwise have arisen by defining and, as we think, enlarging the Board's authority to take affirmative action so as to include the power to order 'reinstatement' of employees. But an authority to order reinstatement is not an authority to compel the employer to instate as his employees those whom he has never employed, and an authority to award 'back pay' to reinstated employees, is not an authority to compel payment of wages to applicants for employment whom the employer was never bound to hire.

"Authority for so unprecedented an exercise of power is not lightly to be inferred. In view of the use of the phrase 'including reinstatement of employees,' as a definition and enlargement, as we think it is, of the authority of the Board to take affirmative action, we cannot infer from it a Congressional purpose to authorize the Board to order compulsory employment and wage payments not embraced in its terms."

The case was argued on March 11, 1941, by Mr. Denison Kitchel for Phelps Dodge Corporation and by Mr. Thomas E. Harris for NLRB.

Continental Oil Company v. NLRB, —Adv. Op.—, 61 Sup. Ct. Rep. 861, U. S. Law Week, 4300 [No. 413, decided April 28, 1941.]

This brief opinion, by MR. JUSTICE FRANKFURTER, notes that the contention of the employer is that reinstatement was precluded because the workers had not remained "employees" within § 2(3) of the National Labor Relations Act. It concludes that the decisive question is governed by the *Phelps Dodge* opinion.

MR. JUSTICE ROBERTS did not participate.

The CHIEF JUSTICE and MR. JUSTICE STONE noted reiteration of their views in the *Phelps Dodge* case.

MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE MURPHY referred for their views to the reasons set forth by them in the *Phelps Dodge* case.

The case was argued on March 11, 1941, by Mr. John P. Akolt for petitioner and by Mr. Thomas E. Harris for respondent.

Bankruptcy—Priority of Corporate Creditors as to Assets Fraudulently Conveyed to Corporation

An individual executed a fraudulent conveyance to a corporation of which he and his immediate family were the sole owners, for the purpose of defeating the grantor's creditors. In subsequent voluntary bankruptcy proceedings the creditors of the individual grantor are entitled to the benefit of the corporation's assets, and a creditor of the corporation, having knowledge of the fraudulent conveyance, is not entitled to satisfy his claim out of the corporate assets in priority over the claims of creditors of the corporate stockholders, but may participate only *pari passu* with the latter.

Sampsell v. Imperial Paper and Color Corporation, 85 Adv. Op. 797; 61 Sup. Ct. Rep. 904, U. S. Law Week, 4288 (No. 601, decided April 28, 1941).

In voluntary proceedings one Downey was adjudicated bankrupt in November, 1938. Prior to June, 1936, he had been engaged in business unincorporated and had incurred a debt to the predecessor of Standard Coated Products Corporation of $104,000. He then incorporated his business as Downey Wallpaper & Paint Co., with himself, his wife and son as sole stockholders, directors and officers. He also transferred his stock of goods to the corporation, which continued business at the old location. Except for qualifying shares, the other shares were not paid for, but were issued in satisfaction of the balance owed Downey by the corporation, a few months before bankruptcy. The respondent extended credit to the corporation, and at the time of Downey's bankruptcy the respondent's claim was about $5,400, unsecured.

After hearing, a referee found the conveyance by Downey to his corporation to be fraudulent, and ordered the corporation's property to be administered as part of the bankrupt estate, for the benefit of Downey's creditors. No appeal was taken.

The respondent was not party to those proceedings, and later filed a claim stating that it was a creditor of the corporation and had a prior right to the distribution of funds of the trustees which had been derived from the corporate assets. After hearing, it was found that the respondent, with knowledge of Downey's indebtedness, had been instrumental in the formation of the corporation and had full knowledge of its fraudulent character. The referee disallowed the claim as a prior claim, but allowed it as a general unsecured claim. The District Court confirmed this order, but the Circuit Court reversed. On certiorari, the judgment of the Circuit Court was reversed and that of the District Court affirmed by the Supreme Court in an opinion by MR. JUSTICE DOUGLAS.

The opinion first comments on the binding character of the order in the summary proceedings as between the parties thereto, i.e., Downey, members of his family and his corporation.

This, however, is said not to mean that the order consolidating the estates did, or in its absence, could determine what priority the respondent had to corporate assets.

In the absence of questions as to a fraudulent conveyance, corporate creditors would normally be entitled to satisfy their claims out of corporate assets, prior to participation by creditors of the stockholder.

But where the transfer was fraudulent and especially where the corporate creditor had some knowledge of the fraud, the creditor is entitled to only *pari passu* participation with the stockholders' creditors. In exposition of this MR. JUSTICE DOUGLAS says:

"But in this case there was a fraudulent transfer. The saving clause in 13 Eliz. which protected innocent purchasers for value was not broad enough to protect mere unsecured creditors of the fraudulent transferee. . . . To be sure, creditors of a fraudulent transferee have at times been accorded priority over the creditors of the transferor where they have 'taken the property into their own custody.' . . . The same result obtains in case of *bona fide* lien creditors of the fraudulent transferee. . . . And estoppel or other equitable considerations might well result in the award of priority even to unsecured creditors of the transferee, the conveyance being good between the parties. . . . Yet none of these considerations is applicable here. The facts do not justify the invocation of estoppel against Downey's individual creditors. Respondent is neither a lien creditor nor an innocent grantee for value. At best it is in no more favorable position than a judgment creditor who has not levied

execution. Furthermore, respondent had at least some knowledge as to the fraudulent character of Downey's corporation. . . . And title to the property fraudulently conveyed has vested in the bankruptcy trustee of the grantor. We have not been referred to any state law or any equitable considerations which under these circumstances would accord respondent the priority which it seeks. It therefore is entitled only to *pari passu* participation with Downey's individual creditors."

The case was argued by Mr. Thomas S. Tobin for the petitioner, and by Mr. Hiram E. Casey for the respondent.

Statutes—Federal Employers' Act

A fireman who discovers imminent danger in the operation of a train is charged with the duty of notifying the engineer of the danger ahead, but he need only prove action which the engineer should have comprehended as a warning.

Jenkins v. Kurn, et al., — Adv. Ops. —, 61 Sup. Ct. Rep. 934, U. S. Law Week, 4323. (No. 732, decided May 5, 1941.)

Emerging from a curve on an interstate train the fireman sighted another train about 600 ft. ahead standing on the same track. He shouted to the engineer to push the brake valve over in emergency. The engineer turned and looked but did nothing. When the engine was only two or three car lengths from the standing train the engineer applied the brakes. The fireman leaped from the engine and sustained serious injuries. He brought action under the Federal Employers' Liability Act in a Missouri state court. The case was tried before a jury on a count which alleged negligence on the part of the engineer. There was a verdict of $12,000.00.

On appeal the Supreme Court of Missouri held that the trial court should have granted a motion for directed verdict, and it reversed the judgment without remanding. The case was taken to the Supreme Court of the United States on certiorari and the judgment of the Supreme Court of Missouri was reversed and the cause remanded. The opinion of the court was delivered by MR. JUSTICE MURPHY.

The theory of the Supreme Court of Missouri was that the burden was on the fireman to establish that he notified the engineer to go into emergency, but that the fireman did not notify the engineer "unless the engineer understood what was said." That there was no evidence that the engineer understood what was said and therefore no right of recovery. MR. JUSTICE MURPHY interprets the theory of the Supreme Court of Missouri as follows:

> "In other words, not only must petitioner prove that he moved to warn the engineer of the impending danger, but he must prove the engineer's subjective comprehension and correct interpretation of that warning, verbal or otherwise."

To this theory MR. JUSTICE MURPHY registers the disagreement of the court.

The opinion admits that the fireman was compelled to prove that the notice was communicated to the engineer, but it holds that it was only incumbent to prove that he should have comprehended the warning under the circumstances disclosed. It is declared that he was not obligated to go further and produce evidence of the subjective reactions in the engineer's mind and that the right of action is not to be burdened with impossible conditions. Continuing, MR. JUSTICE MURPHY says:

> "There was evidence from which the jury could have concluded that if not subject to any physical disability the engineer would have comprehended petitioner's monition and understood that peril was imminent. Petitioner testified without contradiction that he 'hollered' his warning loudly; that only a narrow space separated his perch from the engineer's seat; that the engineer's hearing was 'all right'; that petitioner and the engineer could and did carry on 'normal conversations' while the train was operating; and that there was comparatively little noise in the cab from the train.
>
> "Judged by the test outlined above, that evidence was ample to warrant submission of the issue to the jury. Since other questions which our decision does not touch were presented to the Supreme Court of Missouri, the judgment is reversed and the cause is remanded to that court for further proceedings not inconsistent with this opinion."

Harry O. Waltner, Jr., argued the case for the petitioner; Frank C. Mann argued the case for respondents.

SUMMARIES

Constitutional Law—Interstate Commerce—State Statutes—State Regulation of Agents Transacting Transportation Contracts in Interstate and Intrastate Commerce

People of State of California v. Thompson, 85 Adv. Op. 793, 61 Sup. Ct. Rep. 930, U. S. Law Week 4314. [No. 687, decided April 28, 1941.]

Certiorari to review a judgment of a California court holding invalid as an infringement of the commerce clause of the Federal Constitution, a California statute which requires a transportation agent (defined as those who "sell or offer to sell or negotiate for transportation over the California public highways) to procure a license from the state railroad commission and file a bond for faithful performance of his contracts, when that statute is applied to one who negotiates for the transportation interstate of passengers over the California highways.

The state court had felt restrained to rule as it did because of the doctrine of *DiSanto v. Pennsylvania*, 273 U. S. 34.

The opinion of the Court by MR. JUSTICE STONE holds that the statute does not violate the commerce clause. It points out that Congress had not undertaken to regulate the transportation here involved, since this was mere casual or occupation travel and was, therefore, excluded from the motor carrier act of 1935 by § 303 (b)(9) thereof. It also points out that the statute is not a revenue measure and that, since it applies alike to agents who negotiate for interstate and intrastate travel, it does not discriminate against interstate commerce.

> "It is not shown to be other than what on its face it appears to be, a measure to safeguard the members of the public desiring to secure transportation by motor vehicle, who are peculiarly unable to protect themselves from fraud and overreaching of those engaged in a business notoriously subject to those abuses."

The opinion then restates the rule that the commerce clause, in conferring on Congress power to regulate commerce did not wholly withdraw from the states power to regulate matters of local concern with respect to

which Congress has not exercised its power, even though the regulation affects interstate commerce. The exigencies of the law in this respect are pointed out in the following excerpt from the opinion:

> "Fraudulent or unconscionable conduct of those so engaged which is injurious to their patrons, is peculiarly a subject of local concern and the appropriate subject of local regulation. In every practical sense regulation of such conduct is beyond the effective reach of Congressional action. Unless some measure of local control is permissible, it must go largely unregulated. In any case until Congress undertakes its regulation we can find no adequate basis for saying that the constitution, interpreted as a working instrument of government, has foreclosed regulation, such as the present, by local authority."

Finally, the opinion holds that the decision in *DiSanto v. Pennsylvania,* relied upon by the lower court, was a departure from long recognized principle and can no longer be regarded as controlling authority.

The case was argued on April 3, 1941, by Mr. William J. McFarland for petitioner.

National Labor Relations Act—Appropriate Bargaining Unit; Constitutional Law—Due Process—Delegation of Legislative Power

Pittsburgh Plate Glass Co. v. NLRB; Crystal City Glass Workers' Union v. Same, 85 Adv. Op. 771, 61 Sup. Ct. Rep. 908, U. S. Law Week, 4301. [Nos. 521, 523, decided April 28, 1941.]

Certiorari was granted in these cases to determine the validity of an order of the National Labor Relations Board finding the company guilty of an unfair labor practice in refusing to bargain collectively in regard to employees of one of its six plants with the CIO Federation which had been certified by the Board as the appropriate bargaining unit for all employees of the six plants. The company insisted upon bargaining in that plant with the local independent union composed of employees of that single plant alone. The proceeding had been through three stages before the Board. First, the Board had filed a complaint charging the company with domination and interference with the single plant union. This was concluded without hearing by a stipulated order to cease and desist from dealing with the single plant union as a labor organization. At the instance of the CIO Federation a proceeding was then instituted, resulting in a Board order certifying the Federation as bargaining unit for all company plants. This order was preceded by hearings participated in by both the Federation and the plant union.

After this order the company still refused to recognize the Federation as the appropriate unit for the plant where the local union existed, and accordingly, a complaint charging unfair labor practice on this account was issued by the Board, hearings were held and an order issued which reaffirmed the Board's previous order that the Federation was the appropriate unit for all of the plants and that the company was guilty of an unfair labor practice in refusing to bargain with the Federation in the one plant where the local union had been formed. The validity of this order is the question considered by the Supreme Court in this opinion.

MR. JUSTICE REED, stating the views of the majority of the Court, concludes that the Board's order is valid. It had been contended that the inclusion of the plant where the local union existed was erroneous because neither at the hearings on the appropriate unit nor at the unfair labor practice hearing did the Board permit the introduction of material evidence on the question of appropriate units. This was said to constitute a denial of procedural due process in violation of the Fifth Amendment.

The Board had refused to admit at the unfair practice hearing evidence tendered by the company and the local union as to the desire of 1,500 of the 1,800 workers in the local plant to have that union a bargaining unit and their opposition to Federation representation. The opinion finds that this was already before the Board as a result of its previous hearing on the appropriate unit.

> "It is entirely proper for the Board to utilize its knowledge of the desires of the workers obtained in the prior unit proceeding, since . . . the employer and the . . . union were parties to that prior proceeding. The unit proceeding and this complaint on unfair labor practices are really one. Consequently the refusal to admit further evidence of the attitude of the workers is unimportant."

The Board had also refused to receive evidence that the union was free of employer domination. As to this, the opinion observes:

> "This question of domination is a collateral issue to the determination of the appropriate unit and we think to refuse to hear again upon a subject thus remote from the inquiry was well within the discretion of the Board."

The opinion points out that this question had been the subject of the stipulated order in the first proceeding between the Board and the company, and that, though the union was not a party to that proceeding, it was a party to the second proceeding to determine an appropriate bargaining unit, and was then afforded full opportunity to present the aspects of its case that it chose.

The Board had refused to receive evidence showing that the interests of the single plant employees were distinct from those of the other company plants. The Court finds that this too had already been adequately presented in the appropriate unit proceeding, and that, in the absence of a showing by the company or the union that additional evidence was more than cumulative, "a single trial of the issue was enough."

The Board excluded evidence of the previous bargaining between the company and the local union and of the union's growing membership. As to this, the opinion states:

> "The fact that the local union had undertaken negotiations with the employer or that it had grown in numbers would be of slight probative value in a proceeding to determine the bargaining unit. The Board might properly say, as it did, that accepting the offers of proof it would not alter the determination of the appropriate unit."

Concluding its discussion of this objection that the hearing denied due process of law, the opinion observes:

> "Further, if we consider all the contentions about exclusion of evidence together instead of separately, we do not find that in the aggregate the evidence excluded could have materially affected the outcome on the 'appropriate unit' issue, in the light of the criteria by which the Board determined that issue."

It was also objected that the record contained no evidence to sustain the findings of the Board as to the history of collective bargaining between the Federation and the company, and as to the appropriateness of the company-wide unit. The opinion finds adequate evidence to support both findings.

It was urged that the standards established by the Act for the Board to determine an appropriate unit were inadequate as a guide, resulting in capricious, arbitrary, and unconstitutional delegation of legislative power. The opinion rejects this, observing that the words of the Act, and the definite and elaborate statement of policy in the Act, which the unit selected must effectuate, offered adequate guides.

MR. JUSTICE STONE, joined by the CHIEF JUSTICE and MR. JUSTICE ROBERTS, dissented in an opinion predicated upon their conclusion that both the final order of the Board finding the company guilty of an unfair labor practice and the certification of the Federation as an appropriate bargaining unit should be set aside "because of the Board's failure in those proceedings to afford to petitioner [the union] an 'appropriate hearing' and its failure to determine the unfair labor practice issue on the evidence, both of which, to say nothing of constitutional requirements, are commanded by §§ 9(c) and 10(c) of the National Labor Relations Act."

The case was argued on March 7th and 10th, 1941, by Mr. J. W. McAfee for Pittsburgh Plate Glass Co., and by Mr. Henry H. Oberschelp for Crystal City Glass Workers' Union, and by Mr. Solicitor General Biddle for respondent.

Income Taxes—Expenses Deductible as Incidental to Carrying on a Trade or Business

City Bank Farmer Trust Co. v. Helvering, 85 Adv. Op. 788; 61 Sup. Ct. Rep. 896, U. S. Law Week, 4307 (Nos. 408 and 409, decided April 28, 1941).

United States v. Pyne, 85 Adv. Op. 834; 61 Sup. Ct. Rep. 893, U. S. Law Week, 4310 (No. 683, decided April 28, 1941).

This certiorari was granted to determine whether two testamentary trusts of which the petitioner was executor were, in 1931, "carrying on . . . business" within the meaning of Section 23 (a) of the Revenue Act of 1928.

The trusts embraced stocks and bonds of a value of about $7,600,000 when created in 1923. They increased to about $10,000,000 in value by 1931. The specific point in question here was whether trustees' commissions of $77,000 paid out of principal were deductible in determining taxable income.

The Board of Tax Appeals denied the claimed deduction, and the Circuit Court of Appeals affirmed. On certiorari, the Supreme Court affirmed the judgment in an opinion by MR. JUSTICE BLACK. The opinion cites the ruling in *Higgins v. Commissioner*, 311 U. S.—, as controlling.

A similar question was presented in No. 683, *United States v. Pyne et al*, reviewed on a writ of certiorari to the Court of Claims. The disputed item was $40,000 of fees paid to attorneys for the estate of a decedent. The executors claimed that the amount of the fees was deductible as an expense of an estate engaged in "carrying on . . . business."

The Court of Claims allowed the deduction, but on certiorari the judgment was vacated and the cause remanded by the Supreme Court in an opinion by MR. JUSTICE BLACK. The opinion points out that the finding of the Court of Claims falls far short of a finding that the executors were carrying on a business, and states that the opinion of the latter court makes clear that, in determining whether the estate was carrying on business, the Court of Claims had adopted criteria inconsistent with the holding in the *Higgins* case, *supra*.

The case was argued by Mr. Rollin Browne for the petitioner and by Mr. Arnold Raum for the respondent in Nos. 408 and 409, and Mr. Arnold Raum for the petitioner and by Mr. Allen G. Gartner for the respondent in No. 683.

Constitutional Law—Due Process—State Price Fixing Statutes

Olsen v. State of Nebraska, 85 Adv. Op. 820, 61 Sup. Ct. Rep. 862, U. S. Law Week, 4291. [No. 671, decided April 28, 1941.]

Certiorari to review a decision of the Supreme Court of Nebraska that a statute of that state fixing the maximum compensation that a private employment agency may collect from an applicant for employment violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

The opinion of the Court by MR. JUSTICE DOUGLAS holds that the Nebraska Statute does not violate due process. The Nebraska Supreme Court had based its conclusion of invalidity of *Ribnik v. McBride*, 277 U. S. 350, (1928). MR. JUSTICE DOUGLAS reviews subsequent decisions and shows that the doctrine of the *Ribnik* case, that the validity of price fixing statutes is determined by whether or not the business in question is "affected by the public interest" has been discarded. The opinion also holds that the wisdom, need, or appropriateness of the legislation are not appropriate subjects for inquiry in determining constitutionality.

The case was argued on April 8th and 9th by Mr. Don Kelley for petitioner and by Mr. Walter Grodon Merritt for respondents.

Constitutional Law—Contract Clause—Computation of Deficiency Judgment in Foreclosure Action

Gelfert v. National City Bank of New York, 85 Adv. Op. 806, 61 Sup. Ct. Rep. 898, U. S. Law Week, 4289. [No. 740, decided April 28, 1941.]

Certiorari was granted here to review the holding of the New York Court of Appeals that § 1083 of the Civil Practice Act of that state, as amended in 1938, which provides that the amount of deficiency judgment in a foreclosure action must be determined by deducting from the indebtedness the amount determined by the court to be the "fair and reasonable market value of the mortgaged premises," or the sale price, whichever is the higher, is invalid as a violation of the contract clause of the Federal Constitution.

Prior to 1938, and at the time when the foreclosure action here reviewed was brought, § 1083 of the Civil Practice Act had provided that the deficiency should be measured by the residue of the debt remaining unsatisfied after sale of the property and application of the proceeds. The new section had, in substance, made permanent the provision of the temporary New York moratory deficiency judgment act, upheld in a previous Supreme Court decision. However, the New York Court of Appeals considered that the new section could not stand, because, unlike the moratory act it was not addressed to an "emergency" and was unrestricted in its application. Accordingly, it held that the new section could not be applied to contracts previously made without violating the constitutional contract clause.

The opinion of the Supreme Court by MR. JUSTICE DOUGLAS holds that the new section does not violate the contract clause. The following excerpts from the opinion give a summary of the Court's reasons for this view:

> "The formula which a legislature may adopt for determining the amount of a deficiency judgment is not fixed and invariable. That which exists at the date of the execution of the mortgage does not become so embedded in the contract between the parties that it cannot be constitutionally altered. . . .
>
> ". . . for about two centuries there has been a rather continuous effort either through general rule or by appeal to the chancellor in specific cases to prevent the machinery of judicial sales from becoming an instrument of oppression. And so far as mortgage foreclosures are concerned numerous devices have been employed to safeguard mortgagors from sales which will or may result in mortgagees collecting more than their due. . . .
>
> "Mortgagees are constitutionally entitled to no more than payment in full. . . . They cannot be heard to complain on constitutional grounds if the legislature takes steps to see to it that they get no more than that. . . . there is no constitutional reason why in lieu of the more restricted control by a court of equity the legislature cannot substitute a uniform comprehensive rule designed to reduce or to avoid in the run of cases the chance that the mortgagee will be paid more than once. . . . Certainly under this statute it cannot be said that more than that was attempted. . . .
>
> "As stated . . . the Federal Constitution does not prevent the states from determining, on due notice and opportunity to be heard, 'by what process legal rights may be asserted or legal obligations' enforced. . . . The fact that an emergency was not declared to exist when this statute was passed does not bring within the protective scope of the contract clause rights which were denied such protection in *Honeyman v. Jacobs*, 306 U. S. 539."

The opinion also observes that prior decisions urged as authority for holding the statute invalid as applied to contracts previously made (*Bronson v. Kinzie*, 1 How. 311; *McCracken v. Hayward*, 2 How. 608) have been limited to the special circumstances there involved, and that their broad language cannot be permitted to be employed "to force legislatures to be blind to the lessons which another century has taught."

The case was argued on April 3, 4, 1941, by Mr. George Link, Jr., for petitioners and by Mr. Barney B. Fensterstock for respondent.

Income Taxes—Capital Gain—Proceeds of Fire Insurance Policy

Helvering v. William Flaccus Oak Leather Co., 85 Adv. Op. 790; 61 Sup. Ct. Rep. 878, U. S. Law Week, 4287 (No. 627, decided April 28, 1941).

Certiorari to review a question as to whether compensation received from an insurance company under a fire insurance policy is ordinary income rather than capital gain, for income tax purposes, when no part of the insurance proceeds is used to acquire similar or related property or to establish a fund to replace the destroyed property. The respondent received $73,132.50 under a fire insurance policy for loss of its property through fire but did not replace the property in any way. In its income tax return, it reported the proceeds as capital gain against which it had capital losses exceeding the reported gain.

The Commissioner held that the proceeds of insurance were ordinary income and not capital gain, and the Board of Tax Appeals affirmed. On an appeal the Circuit Court reversed the judgment and the Supreme Court granted certiorari because the decision below conflicted with *Herder v. Helvering*, 106 F. (2d) 153.

The judgment under review was reversed in an opinion by MR. JUSTICE MURPHY. The opinion points out that it is conceded that the entire amount received from the insurance company was required to be included in the respondent's income because the property had been fully depreciated prior to the destruction of the property. The respondent urged that the amount represents capital gain in order that capital losses may absorb it, rather than an item of ordinary gross income.

The opinion rejects this contention and concludes that the transaction here involved was not a "sale or exchange" within the terms of Section 117 (d) of the Revenue Act of 1934, and bears less resemblance to a "sale or exchange" than the transactions embraced in Sections 115(c), 117 (e), and 117 (f), and is consequently not to be placed in any of these categories by implication.

The case was argued by Mr. J. Lewis Monarch for the petitioner and by Mr. John A. McCann for the respondent.

Bankruptcy—Farmer Defined for Proceedings under § 75

Sampayo v. Bank of Nova Scotia, —Adv. Op.—, —Sup. Ct. Rep.—, U. S. Law Week, 4325. [No. 90, decided May 12, 1941.]

Certiorari was granted in this case to determine whether the definition of a "farmer," appearing in § 1(17) of the Chandler Act, or the definition in § 75(r)

of that Act is to be applied in determining whether a petitioner is entitled to proceed under § 75 of the Act dealing with farmer-debtor compositions or extensions.

The Court's opinion by MR. JUSTICE MURPHY holds that the definition in § 75(r) is the one to be applied. It examines the legislative history of both sections and bases its conclusion upon the specialized character of proceedings under § 75 and the legislative intent to afford to proceedings under that section special treatment and applicability.

MR. JUSTICE STONE did not participate.

The case was submitted on April 10, 1941, by Mr. F. B. Fornaris and Mr. Elmer McClain for petitioner and by Mr. Henri Brown and Mr. Walter L. Newsom, Jr., for respondent.

Patent Law—Validity of Patent on Automatic Amplitude Control Device

Detrola Radio and Television Corp. v. Hazeltine Corp., Adv. Op. —; 61 Sup. Ct. Rep. 948, U. S. Law Week, 4326 (No. 666, decided May 12, 1941).

This certiorari was granted to resolve a conflict between the decision of the Court below and a decision in the Second Circuit. The case involves the validity of a reissue patent No. 19,744, relating to a device which is a circuit designed automatically to control the amplitude of amplified signal voltage in modulated carrier-current signalling systems.

Upon a review of the history of invention in this field, the Supreme Court, in an opinion by MR. JUSTICE ROBERTS, reversed the judgment of the Circuit Court of Appeals and remanded the cause for further proceedings. The opinion discusses the technical aspects of the device involved and concludes that it was not invention, but that the advance over prior art, if any, required only the exercise of skill in the art.

The case was argued by Mr. Samuel E. Darby, Jr. for the petitioner and by Mr. William H. Davis for the respondent.

Railroads—Interstate Commerce Commission's Powers over Interstate Rates

Hudson & Manhattan R. R. Co. v. United States, 85 Adv. Op. 840; 61 Sup. Ct. Rep. 884, U. S. Law Week, 4321 (No. 628, decided April 28, 1941).

On an appeal from a specially constituted District Court of three judges, the Supreme Court in a *per curiam* opinion sustained an order of the Interstate Commerce Commission canceling a tariff schedule filed by the Hudson & Manhattan Railroad. In the tariff the railroad undertook to establish a 10-cent fare for interstate transportation on its downtown line, in lieu of its then existing 6-cent fare.

The Commission, in suspending the proposed tariff, did so without prejudice to the establishment of an 8-cent fare, expressing the view that an 8-cent fare would produce more revenue than the proposed 10-cent fare.

The District Court ruled that the findings of the Commission were based upon substantial evidence, that the order was within the Commission's authority, was not confiscatory and did not deprive the railroad of its property without due process of law.

Stating that the effect of the 10-cent fare in comparison with an 8-cent fare in respect of revenues was necessarily one for judgment on the evidence, and that the Commission had evidence as to relevant conditions including the diversion of traffic by reason of a higher rate, the Supreme Court in a per curiam opinion affirmed the order.

The case was argued by Mr. John F. Finerty for the appellant; by Mr. Edward M. Reidy for U. S. and I.C.C.; and by Mr. Charles Hershenstein for City of Jersey City.

ECONOMIC STATUS OF LAWYERS

THE New Jersey Law Journal for May 22nd contains an extended and interesting report of the "Survey of the Economic Condition of Lawyers in New Jersey." The survey was conducted under the auspices of the New Jersey State Bar Association through its Works Progress Administration Committee. The Federal W.P.A. furnished the personnel. The New Jersey State Bar Association furnished supplies, equipment and other financial support.

In preparing the questionnaire, those used in surveys in New York County, and in Missouri, California, Wisconsin, and Connecticut were taken into consideration. A 4-page questionnaire was evolved, which contained a maximum of 270 and a minimum of 260 questions. The questionnaire made an inquiry as to seven different income periods, the aim being to obtain information with reference to the period from 1922 to 1938 and to elicit income information for equal periods preceding and following the financial crash of 1929. The questionnaire was mailed to 7,409 practicing lawyers in New Jersey. Of these, 2,390, or about 33½% answered the questionnaire. Those who answered were fairly distributed over the entire profession throughout the State.

Persons interested may no doubt secure further information from the New Jersey State Bar Association. The object of the survey was to assemble data from members of the legal profession. The results will be used by the Bar Association of the State to show what factors affect legal education and admissions to the Bar. It was also intended that the survey would be of value in determining whether new admissions to the Bar should be governed by a fixed quota. The survey should also reveal information which will be valuable in placement advice to young lawyers. It should also be helpful to educators and law school professors in showing whether there was a relation between the nature of legal education and financial success at the Bar.

LEADING ARTICLES IN CURRENT LEGAL PERIODICALS

By KENNETH C. SEARS

Professor of Law, University of Chicago

Administrative Law

Some Practical Problems Met In The Trial Of Cases Before Administrative Tribunals, by Ralph M. Hoyt, in 25 Minnesota L. Rev. 545. (April, 1941.)

Problem one is double: Is it reversible error to admit hearsay evidence; if not, may it constitute the sole support of an administrative finding? Answer: "It can probably be said with safety that the mere admission of such testimony is not reversible error, but that the use of such testimony as the sole basis for a vital finding, though permitted in a small minority of states, is generally frowned upon by the state and federal courts except where the fact to be proved is of so complicated a character that some degree of hearsay testimony is practically a necessity." Problem two: To what extent is judicial notice by administrative tribunals permissible? Answer: Administrative tribunals seem to have the power to take notice (1) with respect to matters that may be termed the common knowledge of the specialized field in which a particular tribunal is acting and (2) there is a tendency to permit them to take notice of specific facts obtained by experience in disposing of similar cases. However, the courts tend to deny them the right to search their files of reports and statistics and base their findings on data culled therefrom without notice to the parties. Problem three: To what extent may administrative tribunals resort to staff consultations and reports? Answer: There is no objection to the consultations but there appears to be an almost complete lack of approval for placing additional evidence before the tribunal without an opportunity to refute it. In the latter respect, however, there is ordinarily no method of obtaining legal relief if the administrators violate the rule.

Carriers

Discrimination In Freight Rates: The South Wins A Battle, by Nauman Steele Scott and Ferdinand Fairfax Stone, in 15 Tulane L. Rev. 335. (April, 1941.)

This story of the Southern Governor's Rate Case is distinctly interesting, almost fascinating. The belief of the authors is that the decision represents a growing recognition of the industrial revolution in the South and that it is of great importance to every person in the South. Likewise it would appear to this commentator to be of interest to all those who live north of the Ohio and Potomac and east of the Mississippi. At least the complaint was opposed by many northeastern states, associations, and commissions, etc. The South won this struggle five to four, with two I. C. C. members not sitting. A large portion and the most interesting part of the article is historical. The trade and transportation development of the South before the Civil War is set forth briefly. The close of that war found the South economically ruined, the cotton régime at an end, and state finances in a collapse. Since southern railways were linked to both cotton and state finance, they suffered a similar grief. By the time the South had recovered sufficiently to become important it was faced with the fact that freight rates on products moving from the South to the North were higher by thirty-seven per cent than those in the Northern territory. Thus Southern products were at a marked disadvantage in attempting to compete in the important Northern markets. In 1937 political and industrial interests in eight of the Southern states filed their complaint with the I. C. C. They asked for the same mile-for-mile level of rates as the North enjoyed and this apparently was what they secured. The South in order to reach the Northern markets will have to pay for the longer mileage. The majority of the Commission asserted what the South did not deny, that it was not its function to compensate a section of the country for its disadvantages or for the advantages of its competitors. The authors believe that the South has been mistreated. Therefore they hail the victory, precarious though it is, and criticize freely the opinions of the dissenting commissioners.

Constitutional Law

Retroactive Zoning And Nuisances, by Dix W. Noel, in 41 Columbia L. Rev. 457. (March, 1941.)

Zoning to limit only future uses of land was established by the Euclid case. What of legislative action by zoning to effect the removal of existing uses of land? All comprehensive zoning laws are retroactive to some extent because as applied to particular land the effect will be to depreciate the value. Aside from this unavoidable effect, some courts have held that legislative action to prohibit existing enterprises will be sustained only as to enterprises which are common law nuisances. This mechanical idea is regretted. For "the ultimate question to be decided is whether the prohibition is a reasonable exercise of the police power." However, prevailing judicial opinion probably does not justify the destruction of existing buildings, where they are merely unsightly, causing aesthetic annoyance. Billboards and signs may be classified by themselves. With them, Massachusetts is committed to the view that construction of billboards may be prohibited on the basis of aesthetic considerations alone. If, however, the legis-

lation concerning them is given retroactive application it is uncertain whether it will be sustained.

Labor Law

The Apex Case, by James M. Landis, in 26 Cornell L. Qu. 191. (February, 1941.)

Explanation of the Apex case requires one to travel back to the Sherman Act and its background. The decisions under this Act are summarized thus: (1) "Restraints on distribution" violate the Act "independently of their objective or the peacefulness of the means they may employ, at least if they seek to affect a situation at some point in a state other than that where the restraint is active"; (2) "Restraints upon manufacture do not offend the Sherman Act, despite tortious and criminal means employed, unless they have as their primary objective the effectuation of monopoly, price-control, price discrimination or the like, even though, as in the effort to unionize an industry, such an objective may be sought not for itself but because it is essential to the attainment of some one of the normal labor objectives such as wages, hours, or collective bargaining"; (3) Restraints upon transportation were not passed upon. Then came the decisions sustaining the National Labor Relations Act. These called for a radical revision of Sherman Law doctrine. This was not done in a straight-forward manner and our author explains that "he (Justice Stone) was required in the Apex Case to fashion new doctrine though naturally he purports merely to apply old law." His two propositions "must of necessity be paraphrased because the amenities of judicial conversation require judges on occasion to conceal rather than reveal the implications of their thought." Too bad that judges with security of tenure cannot express themselves frankly! The result was a victory for labor and the Clayton Act came to life again. In addition, the policy that Thurman Arnold had set for the Department of Justice was apparently torpedoed except for labor participation in price-fixing agreements. In an "Addendum," Dean Landis discusses the Hutcheson case. The result was to be expected in view of the Apex case. But the "technique of the majority opinion (by Justice Frankfurter) is thus difficult to defend . . ." What of the result? "Certain is it, that the New Freedom of 1914, so rudely throttled by the Supreme Court in the twenties, has now been reborn by the New Deal of the forties."

Labor Law

NLRA—Abuses In Administrative Procedure, by Howard W. Smith; *NLRA—Should The Act Be Amended?* by Abe Murdock, in 27 Virginia L. Rev. 615. (March, 1941.)

The debate is between the chairman and a member of the Special Committee of the House of Representatives which investigated the NLRB. Though both are partisan presentations by legislators who have long had opposite views upon a very controversial subject, their discussions are of value. Mr. Smith is the more emotional and general; Mr. Murdock is the more objective and specific. The former voted against the Wagner Act and apparently is of the same opinion still; the latter is against all of the amendments proposed by the committee and apparently concedes nothing to the opponents of the NLRB. Here are Smith's main objections to the Wagner Act: (1) The provision that "the rules of evidence prevailing in courts of law or equity shall not be controlling" whereby the records "are honeycombed with hearsay testimony, secondary hearsay, remote hearsay, leading questions, and utterly irrelevant material admitted under the heading of 'background' "; (2) The requirement that "the findings of the Board as to the facts if supported by the evidence shall be conclusive." This does not relieve the Board from the rule that the plaintiff's case must be established by a preponderance of the evidence but it does make it possible for the Board to be unfairly partisan and still avoid a reversal by the courts as long as there is substantial evidence in the record to support the Board's finding. The effort to correct this danger is embodied in an amendment that a court may set aside the Board's order if the findings of the Board are "clearly erroneous." Murdock's reply to this is that the expression is vague and subject to various interpretations. It "might well impose upon the court the duty of reweighing the evidence and forming its own independent judgment as to the facts." There are other equally sharp clashes of opinion.

Labor Law

Employer Freedom Of Speech And The NLRB, by Charles C. Killingsworth, in 1941 Wisconsin L. Rev. 211. (March, 1941.)

How much freedom of speech exists for the employer under the NLRB Act which forbids the employer to interfere with the rights of the employees to form labor organizations and bargain collectively? Not very much, it would appear, according to the decisions of the Board. In most of the decisions on the point before the circuit courts of appeal, the opinion has been contrary to that of the Board except as to the use of threats by the employer. Whether the Board's rulings are in accord with the freedom of speech extended to employees who are picketing is not settled by the Supreme Court. It may be possible, however, to distinguish the Thornhill decision. The Board has ruled in only a few cases that contested utterances by the employer were permissible. Some other cases were disposed favorably to employers in the regional offices. In addition, the Board has interpreted the Act to make the employer responsible for the activities of others in a very broad way beyond the common law rule of *respondeat superior.* In this respect most decisions of the circuit courts of appeal have disagreed with the Board. But the Supreme Court in the Serrick case has inclined, apparently, to the Board's point of view. The Board's questionable freedom of speech decisions are a very small proportion of its decisions on that issue. Furthermore, they were unnecessary

in most instances to the ultimate decision. Accordingly, the Board is condemned for unnecessarily irritating employers and for furnishing its enemies with a powerful propaganda weapon.

Legal Biography

The Appointment of Supreme Court Justices: Prestige, Principles And Politics, by John P. Frank, in 1941 Wisconsin L. R. 172. (March, 1941.)

With a view to a better understanding of the Supreme Court of the United States, Mr. Frank had searched the records to ascertain who the justices were, from where they came, and how they got to the court. The sources of information, aside from secondary sources, are the records of the Department of Justice and the Senate Judiciary Committee. But the story begins with 1853 because the records only extend back that far. The first installment ends with the appointment of John M. Harlan. It is interesting reading. There is no attempt to be sensational and one has confidence that what has been recorded is in the scholarly tradition of seeking the truth. Yet there is color and conviction: ". . . Most seekers after judicial office pretended some lack of interest. They hoped to make it appear that their friends pushed them for the office" . . . "In addition there was the inevitable Nineteenth Century certificate of good character from a railway magnate—this time the president of the Cumberland Valley road." "The quality of charm and gentlemanliness implicit in the last reference was Hunt's chief claim to fame and has not saved him from being one of the most obscure Justices. He is remembered for the fact that, although paralyzed, he held his seat for four years (1878-1882) while waiting for an adequate retirement pension."

Private Corporations

Restrictions Imposed By The Directorship Status On The Personal Business Activities Of Directors, by Warner Fuller, in 26 Washington U. L. Qu. 189. (February, 1941.)

"Astonishingly few" are the decisions which deal with the limitations imposed by the directorship status on the personal business activities of directors; and most of them have concerned small or "closed" corporations. This portion of the law seems sound in its ideals even though "a large proportion of the litigated cases are characterized by a variety of inept and unsatisfactory rules." Such a rule is that which states that the company must have "an interest actual or in expectancy in the property" involved, when the question to be decided is whether a director has improperly taken advantage of a business opportunity which permits the director to affect adversely the manner in which his company has theretofore carried on its business. In addition the author analyzes the decisions involving: (1) the appropriation by a director of a business opportunity, such as the purchase of company obligations at and below par, which is not within the scope of a formulated corporate objective; (2) the acquisition by a director of a specific item of property which was either a primary or a post-incorporation objective of his company; (3) the purchase by a director of property which his company has attempted but failed to buy and the purchase of property for resale to his company; and (4) the privilege which a director may have to become associated with a competitive business.

HOTEL ACCOMMODATIONS

Indianapolis Meeting—September 29-October 3, 1941
Official Headquarters—Claypool and Lincoln Hotels

Hotel accommodations, all with private bath, are available as follows:

	Single for 1 person	Double (Dbl. bed) 2 persons	Twin-beds for 2 persons	Two-room suites (Parlor and 1 bedroom)
Antlers (750 N. Meridian)	$3.00–3.50	$4.50–5.00	$4.50–6.00	
Claypool (Wash. & Ill. Sts.)	(All space reserved)			
Columbia Club (Monument Circle)	3.00–3.50		5.00–6.00	
Harrison (Capitol & Market)	3.00–3.50	4.50–6.00	6.00	
Indianapolis Athletic Club (350 N. Meridian St.)	2.75–4.00		6.00	
Lincoln (Wash. & Ill.)	3.00–4.00	4.50–6.00	(Twin-bed rooms and suites exhausted)	
Marott (Apt. Hotel) (2625 N. Meridian)	3.00	6.00	6.00	7.00–9.00
Severin (201 S. Illinois)	2.50–3.50	4.50–5.00	5.00–7.00	10½-11½
Spink Arms (410 N. Meridian)	3.00	5.00	6.00	7.00
Warren (123 S. Illinois)	3.00–4.00	4.50–6.00	5.00–7.00	
Washington (34 E. Washington)	3.00–4.50	4.50–5.50		8.00

A single room contains either a single or double bed to be occupied by *one person.* A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with the parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservation, stating hotel, **first and second choice** of, number of rooms required and rate therefor, names of persons who will occupy the same, arrival date and, if possible, definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Reservation Department, 1140 N. Dearborn Street, Chicago, Illinois.

LONDON LETTER

THIS year marks the eightieth anniversary of the opening of the building now housing the Middle Temple Library. It may, perhaps, be considered remarkable that it does still house it, in spite of its severe battering, to which reference has already been made in a previous letter. The earliest reference to a Library in the Middle Temple occurs in a manuscript generally ascribed to the reign of Henry VIII, which is preserved in the British Museum, and which records the sad fact that "by meanes that it stood allways open, and that the learners had not each of them a key unto it, it was the last robbed of all the books in it." It may be said to have been refounded in the year 1641, in accordance with the will of Robert Ashley, a member of the Inn and brother of Sir Francis Ashley, a Master of the Bench, who left his own collection of books to the Inn, together with a sum of £300, the interest on which was to pay the salary of a Keeper of the Books. Thus, this year is also celebrated the three-hundredth anniversary of the foundation of the present Library. The majority of Ashley's books consisted of non-legal works, chiefly history, geography, theology and philosophy, although some year-books have been identified as having belonged to him.

The Library has experienced many vicissitudes in the three hundred years of its life, sometimes prospering, sometimes neglected almost to the point of extinction. In the year 1700, for instance, it was described as "a place which through long neglect was become a perfect chaos of paper and a wilderness of books which were mixed and misplaced to such a degree that it was next to an impossibility to find out any particular book without falling over the whole." In 1803 it was housed in an old building in Middle Temple Lane. In 1824, when the new Parliament Chambers against the south side of the Hall were completed, the books were removed to this new building. At that time they numbered 7,635 volumes, in addition to the Public Records, *Rotuli Parliamenti,* and Journals of the House of Lords and House of Commons. Thirty years later it became obvious that further accommodation must be found for the Library, and plans were prepared by Henry Robert Abraham, who was a nephew of Lady Bethell, wife of Sir Richard Bethell, Attorney General. The site then selected, had it been used, would have destroyed one of the most attractive features of the Inn, namely the Fountain in Fountain Court, so "delightfully immortalised by the genius of Charles Dickens." Fortunately, before the work of construction began, it became known that the present site on the river frontage, then known as "Essex Wharf and premises," could be purchased, and it was accordingly acquired.

The new building was opened on the 31st October, 1861, by H. R. H. the Prince of Wales, later King Edward VII. On the Prince's arrival for the ceremony he was admitted a Member of the Inn. On a further motion he was called to the Bar, and signed his name in the Call Book, and afterwards was invited to the Bench of the Inn, when, being arrayed in a black gown, he took his place on the right hand of the Treasurer, James Anderson, Q.C. The ceremony was followed by a choral service in the Temple Church, after which a luncheon was served in the Middle Temple Hall, presided over by the Treasurer, and also in a large Pavilion set up in Fountain Court, where Sir Lawrence Peel presided. In the evening a *conversazione* was held in the new Library and grounds of the Inn. It is interesting to note that it was for the festivities in connection with the Prince's visit that the Middle Temple Hall was first lit with gas. The experiment proved so successful that it was adopted permanently until displaced by electricity in the year 1894.

Future Library Prospects

Just prior to the outbreak of the present war the question of still more room to meet the needs of the rapid expansion of the Middle Temple Library was being debated, and it remains to be seen what will happen after the war. In view of the serious damage to both the Middle and Inner Temple Library buildings, and the fact that there is now a large central space available in the Temple, upon which chambers formerly stood, it might be considered desirable to combine the two libraries in a new building to be erected on the site, thus making one large Library available for the use of members of both Inns. By combining the two it would be possible to secure a much better Library than is at present possessed by either Inn, at about two-thirds of the present annual cost of both, and much duplication of effort and expenditure would be avoided. The idea, it must be confessed, is somewhat revolutionary, and it might be argued against it that each Inn would lose some of its individuality; but the use and the expense of the Temple Church has been shared from the earliest days in equal proportions by both Inns, and there seems to be no real reason why the Library should not be similarly shared. The site of the present library buildings would be available for the construction of new sets of chambers, or for any other purpose which might be considered advisable.

It is not impossible to visualise an even larger and still more revolutionary scheme, namely, the amalgamation of the four Inns of Court into one large Legal University, charged with the education of Students for the Bar and the proper conduct of the profession.

Fire Watching in the Temple

Following the great "fire of London," caused by enemy action, an Order known as the "Fire Prevention (Business Premises) Order,

1941," was passed. By this Order it is provided that every occupier to which it applies is obliged to make proper arrangements for the purpose of securing that fires occurring at his business premises as a result of hostile attack will be immediately detected and combated. All members of the staff of the Inns not too much engaged in any other war service immediately volunteered for this duty, and a very considerable number of Members of the Bar and their clerks have also undertaken to carry out the provisions of the Order. A rota has been prepared and the majority of the fire-watchers are on duty for one night each week, from 6 p. m. till 8 a. m. the following morning. The formation of these squads in the Temple has already been amply justified, for, in a recent raid, a small number of incendiary bombs fell in the precincts. One which fell on the Middle Temple Hall was, fortunately, "spotted" by the writer of this letter and, with the help of the Middle Temple fireman, was put out before any damage was done. Two on the Temple Church were also dealt with immediately and no harm resulted. Some damage, however, was caused to the top floors of three other buildings in the Temple, but the fires were got under in a very short space of time. A remarkable, and somewhat amusing, incident happened when one of the bombs penetrated another roof. It lodged on a lead water pipe. The heat melted the pipe and the fire was put out by the water thus released. Other incendiaries fell in the gardens and in various courts of the Temple, but these were immediately and effectively dealt with. During this raid some damage was also done to King's Bench Court 5 and Chancery Court 5, but the Bar Library in the Royal Courts of Justice fortunately escaped.

War Damage Act

This Act received the Royal Assent on the 26th March, 1941, and has been warmly welcomed by every section of the community. Every clause of the Bill in its progress through the House of Commons was carefully considered and many amendments were made to its original form. It affects property which, as regards buildings alone, has been estimated at the value of between £6,000,000,000 and £8,000,000,000, apart from such properties as land, railways, highways, etc. The main object is to provide full security provision against war damage to property and goods, the greater part of which consists of damage to dwelling houses, schools, churches, chapels and hospitals. The Lord Chancellor has said that it is the declared policy of the Government that as regards war damage, which necessarily falls by chance upon one victim or another in a large community, it is impossible to let the loss lie where it falls, and that it is necessary for the State to recognize that this really is a communal responsibility which must be discharged by joint effort. He claimed that it is a very bold, a very ingenious, and a very sound mode of facing those difficulties of the time we are in. The Act is divided into four parts. Part one deals with the scheme for compensation for war damage to buildings and other immovable property, including land and fixed plant and fixed machinery. It is a compulsory scheme and is based upon the collection of funds which will in the first place, be provided by those contributors interested in the scheme. If the funds thus provided are not sufficient to meet the cost of all the damage sustained, then they will be augmented by contributions from public funds, up to the amount which has been raised by contributors under the scheme. If it is found that still there is not sufficient to pay for all the damage done, then the Treasury may either increase the number of instalments, or increase the proportion of the remaining instalments, or both. The contributions will be assessed and collected by the Commissioners of Inland Revenue, who have power to make regulations for the purpose. Contributions will be payable in five annual instalments, beginning on the 1st July this year, and are to be at the rate of two shillings in the pound of the value of the contributory property, except in the case of agricultural property, when the rate will be sixpence in the pound. The reduced rate also applies to land used mainly or exclusively for the purpose of open air games, open air racing or open air recreation.

Part two of the Act contains two further schemes. One is called the "Business Scheme" and the other the "Private Chattels Scheme." The former is, except for certain minor cases, a compulsory scheme, and the latter is a voluntary scheme. The goods insurable under the Business Scheme are goods situated in the United Kingdom which are in possession of the person carrying on the business (whether he owns it or not) and are held or used by him wholly or mainly for the purposes of that business; or which, though not in his possession, are owned by him in the course of that business; or which are the subject of a mortgage in his favour which he holds in the course of that business. The word "business" in this case includes any profession.

The goods insurable under the private chattels scheme are those which are owned by, or in the possession of, any person; or owned by, or in the possession of, a member of his household ordinarily resident with him, or a domestic servant of his. Under the business scheme is included the insurance of movable plant, movable machinery, business equipment and similar articles. (Commodities have already been provided for under the War Risks Insurance Act, 1939.) Policies will be issued on behalf of the Board of Trade by insurance companies and by Lloyds. The premium will be thirty shillings per cent. on the full capital value, and nobody will be allowed to declare an under-value, as is often the case in ordinary insurance business. Under this part of the Act the farmer is given certain valuable advantages, the most important being that, although he is obliged to insure only up to twice the Schedule A assessment on the farm, he is none the less entitled to

recover in full, even though there may be other insurable matters of his on the farm which he has not covered with insurance at all.

Under the private chattels scheme it is provided that payments may be made to a person in respect of war damage to goods such as furniture, books and other private chattels, although it is anticipated that a limit will have to be fixed to the extent of insurance of jewellery or *objets d'art*. Under this part of the Act it is provided that every householder shall have a free insurance up to £200. If he is married a further £100 will be added for his wife and another £25 for each child under sixteen years of age. The individual concerned, if he wishes to do so, may go in for further insurance at the following rates:— 1 per cent. up to £2,000; 1½ per cent. for the next £1,000, and 2 per cent. for the remainder up to a limit of £10,000.

Part III of the Act contains certain necessary and useful amendments to part two of the War Risks Insurance Act of 1939, dealing with the commodity insurance scheme. Part IV contains miscellaneous and general provisions, definitions of words and phrases, and the necessary modifications consequent upon the application of the Act to Scotland and Northern Ireland.

War Damage Commission

Under the provisions of the Act referred to above a War Damage Commission, appointed by the Treasury, has been set up, with Mr. A. M. Trustram Eve as Chairman, who will receive a salary of £5,000 per annum. Other members of the Commission, with the exception of Mr. Charles Mackintosh, Sheriff of Argyle, who gets a salary of £750 a year in view of his special duties involving many questions peculiar to the legal system regarding land and property in Scotland, will serve without remuneration. Members of Parliament are disqualified for appointment as members of the Commission. The Commission have power to regulate their own procedure. The Chairman, at their first meeting on March 28th, stated that sympathy, simplicity and speed would be the guiding principles. A regional office would be established at the headquarters of each Civil Defence Region, but in London, because of its size, there would be four offices. The Headquarters at Devonshire House would be reserved for advice on doubtful cases, for dealing with cases of special classes of property, and for seeing that the claimants throughout the United Kingdom were treated with uniformity and with equal speed. Policy would emanate from Headquarters, but the day to day work of the Commission would be done in the regional offices. It is believed that the Commission will be ready to receive claims in London in less than a month, and outside London about a fortnight later.

Inner Temple Library

It will be remembered that, in a previous letter, reference was made to the arrangements which the Librarian of the Inner Temple had made to have the more valuable books in that Library taken to a place of safety. Since the disastrous fire which caused so much damage this good work has, under his supervision, been proceeded with, and many valuable books have been rescued and sent away. Even in this effort, however, fortune has dealt another hard blow. Recently one of the lorries engaged in transporting the books was involved in an accident which caused the petrol tank to catch fire, with the result that the consignment was reduced to ashes.

MIDDLE TEMPLE S.

ROSS ESSAY COMPETITION

THE 1941 competition for the $3,000 prize established under the will of Judge Erskine M. Ross, of Los Angeles, California, has been won by Mr. Willard Bunce Cowles, of Washington, D. C., a member of the Association who is in the United States Department of Justice. The winning essay is published elsewhere in this issue; two other essays of especial merit will be published in later issues.

This year's topic for the Ross Essays was "Prospective Development of International Law in the Western Hemisphere as Affected by the Monroe Doctrine." For the first time since the initial award of the prize in 1934 (see 65 ABA Reps., page 529), the subject decided on by the Board of Governors was in the field of international law and relations. Because of its great timeliness and importance for the future of this hemisphere, there was wide-spread interest in the competition; and many of the essays submitted were of outstanding excellence.

This year's Committee of Award, whose recommendation as to the winning essay was adopted by the Board of Governors in Washington on May 6th, was made up of Ex-Justice William L. Ransom, of New York, a former President of the American Bar Association, as Chairman; Mr. Justice William O. Douglas, of the Supreme Court of the United States, serving his second year on the Committee; and Dean Joseph A. McClain, Jr., of the Law Department of Washington University, in St. Louis, Missouri. It is stated that the recommendation of the Award Committee was unanimous.

Members of the Association and the profession may draw their own conclusions from the fact that although the competition offered to lawyers an opportunity to win a prize of $3,000 as well as one of the high honors of the profession, no more than fifty lawyers submitted essays, on a subject so actively under public discussion. Contrary to what might have been expected by some, however, the contestants were by no means confined to the North and East, or to those engaged in teaching or practising international law. The

(Continued on page 393)

SUMMARY OF PROPOSED REFEREE-IN-BANKRUPTCY BILL

By JACOB I. WEINSTEIN
of the Philadelphia Bar

SEC. 1 of H. R. 4394 amends Sec. 1 of the Chandler Act by adding explanatory definitions of several new terms recurrently used in the Bill, namely, "circuit," "senior circuit judge," "conference," "council" and "Director."

Sec. 2 rewrites Sec. 34 of the Act. The appointment of referees is still retained in the district judges, but where there is more than one district judge in the territory, appointment is made by concurrence of a majority. Term of the office is extended from two to six years and a full-time referee is entitled to re-appointment for successive terms, unless the Director of the Administrative Office of the United States Courts recommends against re-appointment on the ground of incompetency, inefficiency, misconduct or neglect of duty and transmits to referee and to the council a copy of his report. If the Director recommends against a re-appointment the district judges shall not re-appoint without the approval of the council, and if he recommends a re-appointment the district judges shall not refuse to re-appoint without the concurrence of the council. The removal of a full-time referee during his term of office, by like procedure.

Sec. 3 amends Sec. 35 of the Act, by prohibiting a full-time referee from holding any State or other Federal office of profit or emolument.

Sec. 4 completely rewrites Sec. 37 of the Act. Director is required to make a study of conditions throughout the country in order to recommend to the councils and to the conference (Senior Circuit Judges) number of referees to hold appointment and territory which each shall serve. The territory of a referee may extend beyond a judicial district but must be within the same circuit.

The initial survey shall be made by the Director, within two years after the Bill is enacted. A part-time referee may be appointed for a particular area if the Director finds that the employment of a full-time referee would not be feasible. The Director shall report to the councils and to the conference, for the determination by the conference of number of referees to be appointed, the territories to be served, their salaries, and the schedules of additional fees which may be charged in asset and arrangement cases, as provided by Sec. 40 a. Upon determination by the conference, the district judges shall appoint the designated number of referees, as far as practicable, from the referees then in office. When the judges have made the selection, the Director shall divide the number staggering their terms for two, four and six years respectively.

After such determination, the conference may, from time to time, upon the recommendations of the Director and of the councils, change the number of referees and the territories to be served.

Sec. 5 amends Sec. 39 (b) of the Act, by prohibiting full-time referees from practicing law.

Sec. 6 completely rewrites Sec. 40 of the Act. All referees shall be on a salary basis and shall be compensated by the salaries fixed by the conference upon recommendations of the Director and of the councils, at not less than $3,000 nor more than $10,000 per year for full-time referees, and not more than $2,000 per year for part-time referees. Not more than once every two years, the salary of a referee may be changed by the conference, on the recommendations of the Director and of the councils, but the salary of a full-time referee may not be reduced during his tenure of office.

A referees' salary fund and a referees' expense fund shall be set up in the Treasury of the United States, into which shall be covered all fees and allowances for services of referees and their expenses, including their services as special masters. Salaries shall be paid out of the salary fund and expenses, including their clerical assistants, out of the expense fund. Any deficiency in either fund shall be made up by the Treasury.

With each petition filed, primary or ancillary, the clerk shall collect a filing fee of $15 for the referees' salary fund and a fee of $15 for the referees' expense fund. Additional fees may be charged for each fund against each estate liquidated in bankruptcy and shall be computed on the gross assets realized, and against each arrangement case confirmed under Chapter XI, computed upon the amount paid to unsecured creditors in accordance with the terms of the arrangement. The schedules may be revised by the Director from time to time. The Director may make rules and regulations for the effective operation of these schedules.

The initial funds are to be made up from the balances remaining when the amendatory Act becomes operative. The pending cases of outgoing referees shall be re-referred.

After a referee has reached the age of seventy years and has been in office at least ten years, he may resign and become entitled to retirement benefits. He may also retire voluntarily, or be retired because of permanent mental or physical disability. In any such case, he shall be entitled to receive annually, for life, a salary payment equal to one-half of the salary paid to him when he retired. Part time referees shall not be entitled to these retirement benefits.

Pensions are also provided for sitting referees who will be let out when

the amendatory Act becomes operative, but such pension shall not exceed $4,000 per year.

Sec. 7 amends Sec. 43 of the Act. When a vacancy occurs in the office of a referee, or when its occupant is absent or disqualified to act, the clerk of the district court shall so notify the Director. In any such case, another referee may be designated by the judge or the council may designate another referee from the same circuit. A vacancy shall not be filled by a new appointment unless the Director so recommends to the councils and to the conference.

Sec. 8 amends Sec. 51 of the Act. The clerk is required to collect the various fees provided and transmit all such moneys to the Treasury.

Sec. 9 amends Sec. 53. As revised, Sec. 53 imposes upon the Director the duty to gather all statistics in regard to the operation of the Act and to make annual reports thereon to Congress.

Sec. 10 repeals Sec. 54, as amended.

Sec. 11 amends Sec. 62 of the Act. The actual necessary expenses of referees shall be paid, when authorized and approved by the Director. The referees are to have free mailing privileges and may employ, when authorized by the Director, necessary clerical assistants at rates of compensation to be fixed by the Director, and may remove such assistants at will. Provision is also made for payment of travel and subsistence expenses of referees when authorized by the Director.

Sec. 12 amends Sec. 64 a (1) of the Act, by according to the fees for the referees' salary and expense funds, priority, as an administration expense, on a parity with the other items set forth in that clause.

Sec. 13 amends Sec. 72 of the Act, by reiterating that salaries shall be full compensation for referees and that allowances to them while acting as conciliation commissioners or special masters under the Act, shall be covered into the Treasury.

Sec. 14 amends Sec. 117 of the Act, by emphasizing the advisability of making the special references under Chapter X to the referees rather than to outsiders.

Secs. 15, 16 and 17 amend Secs. 624 (3), 633 (2) and 659 (1) and (3) of Chapter XIII of the Act, (wage-earner plans), by conforming changes. The amended sections deal with the fees for services and expenses of referees in wage-earner proceedings.

Sec. 18 provides that Secs. 1 and 10 of the amendatory Act, and so much of Sec. 4 as amends Sec. 37 (b), shall become effective when the Bill is enacted. The other provisions shall become effective sixty days after the conference has promulgated its initial determinations.

Sec. 19 contains the customary safeguards regarding repeal of inconsistent provisions, and the severability of provisions which may be invalidated.

THE PENDING REFEREE-IN-BANKRUPTCY BILL

WHY I APPROVE IT

By FRANCIS M. SHEA*
Chairman, Attorney General's Bankruptcy Committee

THE pending bill now before Congress [H.R. 4394; S. 1437] and which is summarized above by Mr. Weinstein, is an outgrowth of the recommendations of the Attorney General's Committee on Bankruptcy Administration.[1] Those recommendations were the result of a comprehensive and exhaustive examination into the practical workings of the present system of bankruptcy administration, with special emphasis on the office of the referee in bankruptcy.[2]

It is difficult, in so brief a space, adequately to present the detailed nature of the Committee's research and the wide scope of the data upon which its conclusions are, we believe, fairly predicated. Questionnaires to judges, referees, trustees, receivers, creditor organizations, bar associations, members of the National Bankruptcy Conference and other experts, case analyses by law school students, field studies and personal conferences all played a part.

The Committee's findings indicate that the diffusion of supervision and control over 450 referees among 189 district judges, to whom the referees are alone responsible at the present time has worked out poorly. The semi-annual reports required of referees by General Order 26, and which are the primary source of information for the judges as to the referees' fiscal and administrative practices were, in many cases, not filed at all, or filed in such form as to be almost useless. Thus, for the first half of 1939, 54 percent of the referees had failed to furnish the information required by the order. In a number of instances where adequate reports were filed they were never checked. No one has ever attempted to secure missing returns, or to secure a revision of the defective ones. Indeed, no one even had an accurate list of the number of existing referees. The examiners' reports of the Department of Justice, another source of information, were all too infrequently made, due to the small staff of examiners available and the magnitude of the task that they faced.

*Mr. Shea is at present an Assistant Attorney General in charge of the Claims Division in the Department of Justice, and was formerly Dean of the University of Buffalo Law School.

1. A Committee Print of H. R. 4394, containing annotations prepared by Mr. Charles A. Horsky and Mr. Leon Frechtel of the staff of the Bankruptcy Committee, explains the various provisions and specific language incorporated therein, and refers to the appropriate recommendations in the Report upon which they are based.

2. Report of the Attorney General's Committee on Bankruptcy Administration (1940). The Report is reviewed in 50 Yale L.J. 1132 (1941).

Probably the outstanding characteristic of present bankruptcy administration is the marked variations in practice that one finds in going from district to district, and which often exist even with the same judicial district.[3] This, of course, presents many obstacles to creditors operating nationally, who are thus forced to adapt themselves to many varying practices which all too often have no logical or reasonable basis for existence.

Another of the results of the present sporadic, local supervision has been an almost complete lack of coordination. No evaluation of the best practices has ever been possible. No one has been charged with the duty of disseminating such practices throughout the country. There have, however, been even more serious consequences. Improper fiscal practices have gone unprotected and unpunished for long periods of time. The expense of bankruptcy administration has been unjustifiedly increased in many areas to the serious detriment of bankrupts and creditors alike. Delays have been frequent, since no one attempts to speed up the process where there is an obvious lag. The result has been an inevitable loss of public confidence in bankruptcy administration.

As a result of these findings the Committee recommended the creation of a central coordinating body which would function as a unit in the Administrative Office of the United States Courts. That body is in no sense to be considered as a policing organization. Rather, it would be in a position to collect adequate bankruptcy statistics, see that periodic and frequent examinations of the affairs of the referees and other bankruptcy officials were made, receive and investigate complaints, conduct immediate and continuing investigations of the rules and practices in bankruptcy administration throughout the country, and act as a clearing house for all suggested amendments to the Bankruptcy Act, the General Orders, and the local rules.

The recommendation of the Committee for the creation of such a bankruptcy division has met with unanimous approval. The National Bankruptcy Conference heartily endorsed it last fall. It received extensive consideration at a special meeting of the Judicial Conference of Senior Circuit Judges in January of this year, and pursuant to their approval[4] such an agency is now being set up in the Administrative Office of the United States Courts. Its creation has required no additional legislation, since the Administrative Office already has the requisite authority for the performance of these functions.

The difficulties inherent in the present fee system of part-time referees, with its tremendous variations in the amount of work performed, the area covered, the time spent, and the amount of compensation received, have been pointed out in considerable detail in Part II of the Committee's Report.[5] Thus, among the so-called full-time referees, the range of performance was from 1,200 cases closed by the top referee to but 14 closed by the full-time man turning in the lowest quota. Of the 92 referees in this full-time category only 36 were really doing full-time work. The variations among part-time referees were even greater — several closed no cases at all, while others closed as many as 500 or 600 cases. Compensation ranged from nothing to approximately $20,000.

The present charges for compensation are cumbersome and not integrated, and the entire indemnity system has been the subject of the greatest abuses. There can be no escaping the indictment of possible self-interest in every decision that a referee makes, due to the basis upon which his commissions and fees are figured. Since he is dependent upon his fees, there has also existed the temptation to make bankruptcy attractive to bankrupts and attorneys alike, in order to successfully compete with other liquidating devices. The fee system is being gradually eliminated as a means of compensating public officials. Thus, the United States Clerks and the United States Marshals are now on a salary basis. The time has arrived for its abolition in the bankruptcy field. At a time when all of our democratic institutions are under the most severe attack that they have had to sustain in over a century not a scintilla of possible bias and prejudice among our judicial officers should be permitted to remain.

The office of referee in bankruptcy has become one of increasing importance since the enactment of the Chandler Act. The proposed legislation is a recognition of this change, and is aimed at elevating the office by extending its term to 6 years, by increasing the security of tenure in making specific the grounds for removal and non-reappointment, and by providing suitable retirement privileges. The individual selection and appointment of referees are to be left in the hands of the District Judges. The number of referees, the territory to be served and the salary to be received are to be ascertained by the Director of the Administrative Office after a careful nation-wide survey extending over a period of 2 years. His recommendations are then to be subject to the scrutiny of the respective Judicial Councils, and the final determination is to be made by the Judicial Conference. The Committee believes that this procedure eliminates the primary difficulty that has been encountered in all previous attempts to make this transition. The executive branch of the government plays no part in this procedure, the entire matter being controlled within the judicial sphere where it has traditionally belonged. The proposal essentially contemplates the same sort of supervision by the Director of the Administrative Office and the Judicial Conference that is now exercised by them over the entire federal judiciary. There certainly seems to be no justi-

3. Some of these variations are discussed in detail in Appendix B of the Report of the Attorney General's Committee, pp. 183-239.

4. Report of the Judicial Conference, Special Session (Jan., 1941), p.2. The report also appears in 27 A.B.A.J. 183 (March, 1941), and 15 Jour. of N.A.R.B. 101 (April, 1941).

5. See pp. 53-115.

fication for leaving referees, who are subordinate judicial officials, out of the range of effective supervision. It is, furthermore, difficult to conceive any procedure that could be further removed from politics or from possible extraneous pressures. The Director is appointed by the Supreme Court, and all the employees of his office are subject to the Court's approval. In addition, the Director functions directly under, and is subject to, the supervision of the Judicial Conference. Certainly if a person can have no confidence in the ability, integrity and impartiality of the respective Circuit and Supreme Court judges, he can have confidence in no one.

The evidence clearly points to the need for a change. That this is so is further indicated by the support that the Committee's proposals have received from the Judicial Conference, the National Bankruptcy Conference, the National Association of Credit Men, the National Retail Credit Association, and almost every interested agency and body.

There have been a few dark pages written recently in the long and honorable history of the judiciary and the bar of these United States. Looseness in bankruptcy practice has afforded the motive and opportunity for certain ill-starred and uncommon behavior. It is a challenge to the Bench and the Bar. We must not be tardy in seeking to right whatever occasion has tempted the defaults. Surveillance by the highest members of the judiciary and their selected officers would appear to offer desirable safeguards. The legislation presented represents the composite views of many of the ablest and most experienced men in the bankruptcy field. The suggestions of other able and experienced men are, of course, invited. Perfection will certainly be wanting in the end product. Only inaction, indecision and refusal to cope with our common problem is to be condemned.

THE PENDING REFEREE-IN-BANKRUPTCY BILL

WHY I OPPOSE IT

By HON. ARTHUR J. TUTTLE

Senior Judge, United States District Court, Eastern District of Michigan

I AM glad to respond to the invitation to write the negative on the question of the enactment of pending legislation embodied in House Bill 4394 (S. 1437), for I have been keenly interested in and actively supervising bankruptcy administration for more than a quarter of a century.

I am opposed to this legislation for four reasons,—(1) there has not been and is not now any general demand for it; (2) there is no necessity for it; (3) it would not, if enacted, accomplish the results desired; and (4) it is positively dangerous in its tendency.

1. No General Demand

The background of this proposed law is the enthusiasm of a very fine and well-intentioned Attorney General of the United States, but one who had never had any practical experience in bankruptcy administration. A Committee was appointed by him of very able and distinguished men, who, with but few exceptions, had never had any experience in bankruptcy. This Committee approved a Draft prepared by excellent men of very considerable academic ability, but, again, without practical experience. They later obtained, it is true, the advice and counsel of some of the best bankruptcy men in the country in an effort to perfect their draft as much as possible.

There has never been any demand, so far as I can discover, on the part of the credit men, the business interests generally, debtors, courts or lawyers for such legislation. There is not now such a demand. If one is created, it will be purely artificial, not inherent.

2. There is No Need

Our bankruptcy law, originally enacted more than forty years ago, and recently revised and modernized by some of the ablest bankruptcy men we have, is working reasonably well. It represents the considered thought and practical experience of well on toward half a century. It is based on established principles. As perfected, it is calculated to serve us well for an equal length of time. In my opinion, it would be well for us to let it alone for awhile, without substantial amendment, so that lawyers, courts and referees may know what the law is, how to interpret it, and how to enforce it. It is not a kaleidoscope, to be continually turned in order to get a new picture. Unless it is bad, it is something that should remain reasonably permanent. If it is to be changed, it ought to be by amendment here and there relative to things that we can plainly see are going to be improved by the amendments. When it comes to radical changes, it is very difficult for the promoters to see the misfortunes of the things proposed. If there is a fault in the law we have, some people are inclined to feel that by changing it all around we are going to have something perfect. They fail to recognize that the new proposal is going to have faults of its own and is likely to have faults far greater than those in the existing law.

3. Would Not Accomplish Results Desired

The proposition is to center all bankruptcy administration in Washington. Distant control is bad to whatever feature of the Act it is applied, and the power and extent of that control are going to increase. The administrative control should not have any greater power or force than it had under the Attorney General, and this should be a very minor, limited control. That is what was supposed to have been transferred

from the Attorney General's Office in the Executive Department to the Administrative Office in the Judicial Department. The Administrative Office should continue, as the Attorney General's Office did in the past, to examine the various Referees' Offices; and when something good is found in one district it should be taken to the other districts for use if it appeals to the courts there. The power should not be such in the Administrative Office that it is able to *force* anything upon any Court. The power should remain with the Judges and with the Referees to conduct their own courts, and the Administrative Office should be advisory only. If our law has changed that function, then we did not realize it, and we should be looking for amendments to undo the mistake, instead of transferring more power from the District Judges to the Administrative Office.

It is argued that the changes will provide uniformity of practice. This matter of uniformity is very much overworked, in my judgment. Uniformity and regimentation are the very things which deaden everything. What is the way to advance with the times? What is the way to keep step with what is needed? It is just the reverse of uniformity wished onto localities from a central point. Suppose things are done differently in different parts of the country, what of it? The same general results are obtained. With some latitude in administration, individual Judges and Referees in their respective districts can discover things which are needed. The Court is, in a sense, an experimental station for the purpose of improvement. Under the centralized scheme, there is but one such station, and that far removed from the scene of action where it can neither accurately perceive nor fully appreciate the conditions. This spells just the opposite of progress. It spells just the opposite of meeting the need. It spells a rut. We have accomplished some things in the Eastern District of Michigan which never could have been attained under any such bureaucratic scheme.

There is no question that we have too many referees in the country. The present law recognizes that fact. Instead of reducing the number, as has just been done in some districts under the law that we now have, the proposed plan will eventually increase the number. If Referees are given salaries, you will soon find pressure in Washington for additional Referees; the existing Referees will not oppose because they will be relieved of some work without reduction in salaries; pressure will get results and the politicians will get what they ask. Within a few years there will be at least as many Referees as there are Judges—all at an added expense to the government without improving the service in any way.

If Referees are receiving too much for their services, cut down the fees—that is an easy thing to do by a simple amendment. There is no fairer way to compensate a referee than to give him a commission on the results obtained. Just as soon as you attempt to compensate referees by salaries you are going to do something that is not fair. Some are going to get more than they ought to get; some are going to get less; and the control of the whole thing is going to be somewhere else—in Washington. There are lots of old stock arguments which can be used against the fee system, and in many offices a fee system is bad, but I say it is not bad in the Bankruptcy Court. I have never known of an instance in which the fees received had any influence whatever upon the referee deciding the case. If there is fear of that kind, it is possible to amend our present law to remove it. An amendment can readily provide that a creditor who receives the money shall pay the Referee's commission on the amount received. In other words, fix the law so that it will not make any difference to the referee whether he decides that the money goes to A, a secured creditor; B, a preferred creditor; or C C C, general creditors—so that the whole fee is not taken entirely out of the general creditors. This can be done without any difficulty whatever.

When it comes to fixing salaries, it is easy to see the evil which will ensue. There will again be pressure and influence of all kinds will be used to increase salaries. Every time a Referee gets a big case, or some local situation brings on a wave of business, he will be showing statistics to justify an increase, but there will never be any reduction. The proposed remedy is a worse evil than the alleged evil, and both can easily be avoided.

The Bill is very evidently framed on the preconceived theory that there *must* be something wrong with our bankruptcy courts; data was collected, and rather scanty at that, in an effort to substantiate the theory; it was put together in a report and then in a bill by men who know about almost everything else but bankruptcy; and the result is naturally just what we see—an impracticable plan.

4. Plan Positively Dangerous

Placing in Washington the power to appoint and the power to fix salaries is bound to subject administration, now quite free from politics, to political pressure, which may eventually destroy our fine system. Why do it?

The proposal generally is a step in the direction of bureaucracy. Back in 1932, a proposal to do the same thing in a different way with a small army of new officials to control and regulate bankruptcy was defeated under the leadership of the American Bar Association and other nationwide organizations: This is exactly the same kind of a proposition. It is attempting to put the same kind of a structure in the Judicial Department that was proposed for the Executive Department. There is no difference in the architecture; the only difference is in location.

Above all and beyond all is the great danger in the increasing control over the judiciary under a centralized system. I have only the most kind and the most complimentary words to say about our new Administrative Office, but centralized control should not be given to it nor to any other office. Such a course is full of danger.

WASHINGTON LETTER

THE power to establish priorities in the filling of defense contracts and to allocate materials among those manufacturers engaged in defense work is in the process of being extended. At this stage, the only question seems to be whether this power shall be delegated to a statutory director, as proposed in the House [H. R. 4534] or whether the Senate's plan shall prevail, whereby the President would exercise this power, under the general authority conferred on him; through such department or agency as he might direct and in accordance with rules and regulations to be prescribed by him. The method preferred by the Senate is believed more likely to be adopted.

The bill concerning priorities which has passed both houses and is now in conference for the working out of differences in the details, definitely extends the government's authority to grant priorities; (a) to contracts or orders which the President deems necessary for the defense of the United States; (b) to contracts or orders for the government of any country whose success the President considers vital to the defense of the United States; and (c) to any subcontracts which the President believes necessary for the accomplishment of either of the other purposes just stated.

Other features of the bill are that the President could require any person, firm, or corporation to furnish all information and reports which may be necessary for enforcement of the priority provisions; and that no individual, firm, or corporation would be held liable in damages or for a penalty for default under a contract or order where such default resulted from any priority or allocation rule or regulation.

Priorities Board of OPM

A different use of priorities is one not devised by law but by a practice recently set up in the Office of Production Management. There has been added to the Priorities Board of that office an advisory representative who is to have the duty of formulating a program designed to "meet essential Latin American requirements for industrial and consumer non-military goods and materials." As a result of the war the American republics have been cut off from much of the material formerly supplied them by continental Europe, especially Germany.

It has been stated in the current bulletin of the Berlin Institute of Business Research that, on account of its own defense program and the requirements of Britain, the United States cannot supply Latin America with the goods needed by its industries and business enterprises. Washington experts have pointed out that official figures do not bear out such a statement. It is hoped that any appearance of such inability of this country to supply the industrial needs of our southern neighbors may be avoided by appointment of the advisory representative mentioned. To this position Nelson Rockefeller has been appointed. He has been coordinator of commercial and cultural relations between the American republics.

Senator from West Virginia

Decision by the Senate to seat Dr. Joseph Rosier, of West Virginia, appointee of Governor Neely, was made after debate of the case on the Senate floor. The vote, as shown at page 4066 of the Congressional Record, Vol. 87, No. 89, aside from being in some respects according to partisan political lines, was chiefly along administration and non-administration lines.

The total vote was 40 for Dr. Rosier and 38 for Mr. Clarence E. Martin, President of the American Bar Association 1932-33. Many of the Senators though not voting were announced as paired for and against the motion to seat Mr. Martin, the record vote having been taken on that form of motion. Only one Republican, Senator Davis, of Pennsylvania, voted for Dr. Rosier to fill the two years of the unexpired senatorial term. Voting for Dr. Rosier also were LaFollette, Progressive, and Norris, Independent. Twenty Democrats voted to seat Mr. Martin and 37 Democrats voted to seat Dr. Rosier. The newly appointed Senator, who is 71 years old, has announced that he will not seek election after the present term expires.

It would be useless to attempt, in a short space, to give a real summary of the arguments presented by both sides. The discussion was interesting but naturally long-drawn-out. That was natural in a deliberative body where interruptions by other members are so freely permitted as is done in the Senate. The larger part of the sessions for four days was devoted to this case; those interested in its details will find them in the Congressional Record for May 8, 9, 12, and 13, 1941.

The problem presented by the facts of the case was explained in the Washington Letter to the Journal, February, 1941, issue, p. 122. In outlining the general position of each side, it might be said that those favoring Mr. Martin contended there was an interval of time between when Mr. Neely's resignation as Senator took effect and when he, as Governor-elect, became Governor; and that the retiring Governor Homer A. Holt, during that interval, effectively appointed Mr. Martin to the senatorship; hence there was no vacancy to be filled when Mr. Neely became Governor.

The members of the Senate who presented Dr. Rosier's case took the position that former Senator and Governor-elect Neely, ceased to be Senator and became Governor, at the same instant, thus allowing no interval of even the shortest time for the filling of the senatorial vacancy by retiring Governor Holt. The latter had issued several contradictory certificates of appointment to Mr. Martin. The latter theory involved, in part, the idea that the oath of an of-

fice to which a person has been elected—when taken several minutes before his term, under the provision of the statute, is to commence—serves to qualify him for the office and that he therefore actually becomes such officer by and at the exact commencement of the statutory period for which he has been elected. This is an interesting point of view to those on-lookers who have become accustomed to the idea that the taking of the oath is what actually makes the elected person an officer.

Facts About the Navy

Of timely interest is a Senate document recently authorized to be printed entitled "The United States Navy." It was prepared by the Bureau of Navigation of the Navy Department, at the request of Senator David I. Walsh, as Chairman of the Committee on Naval Affairs. This document will be illustrated and will contain the latest information as to the organization, personnel, fleet, land establishments, and other facts about the Navy. Senator Walsh stated that it will give "the only complete information to be found in a condensed form relative to the activities and organization of the Navy."

The recent launching, at Philadelphia, of the U. S. S. Washington was a notable contribution to the law of the seas. It is understood that it was named after the State of Washington. The ship is commanded by Captain H. H. J. Benson, well known both in the District of Columbia and at Annapolis. At the commissioning of this 35,000-ton vessel, Secretary of the Navy Knox referred to it as "one of the two greatest battleships that ply the ocean"; and also spoke of it as being the most formidable unit in what is to be "the finest Navy the mind of man has ever conceived."

Freedom in America

A trenchant, timely statement recently was made in Washington by Mr. Arthur T. Vanderbilt, President of the American Bar Association 1937-38 and a member of the Attorney General's Committee on Administrative Procedure. In an address before a meeting of the United States Chamber of Commerce, Mr. Vanderbilt said:

"Very many Americans still think of freedom, not merely as their birthright but as a gift of nature. Nothing could be further from the truth, as the slightest glance at either the contemporary scene or the pages of history will demonstrate. Freedom, as Americans have known it, has all but vanished before the onslaughts of dictators on three continents, and on the fourth it is often more respected in form than in reality. It has existed a brief century and a half out of six thousand years of recorded history, not to take into account the incalculable ages of man's rough rise from the cave.

"Too often, however, we have identified freedom with the provisions of the Bill of Rights. Not everything that we all mean by freedom is vouchsafed by our constitutions, state and federal. Indeed, some of the most valuable aspects of our freedom lie beyond the constitutional pale.

"Equally important in its consequences on our national life is the gradual weakening in recent years of the right of local self-government. The taking over by the state and the federal governments of a wide variety of municipal functions has tended, to a marked degree, to take government away from the people and to weaken the sense of individual responsibility for community welfare. Even more devastating has been the weakening of the independence of local government through subsidies for projects that they never would have undertaken at their own expense.

"Of the two responsibilities, the problem of national defense and of war, if necessary, is by all odds the easier one to meet. Our people react swiftly to foreign interference, especially from those whose ideas differ from ours. Moreover, the necessity of preparing for national defense is more obvious than the necessity of preparing for peace."

Ross Essay Competition

(Continued from page 386)

participation was substantially Nation-wide. Some twenty-one States were represented by contestants for the prize. These included Ohio, Michigan, Illinois, and Wisconsin, in the Middle West; Minnesota, in the Northwest; Missouri, Arkansas, Oklahoma, and California, west of the Mississippi River; Kentucky, Tennessee, Georgia, North Carolina, Virginia, Maryland, and the District of Columbia, in the South; Delaware, Pennsylvania, New Jersey, New York, and Massachusetts, in the Northeast.

More than a few of the competitors were practising lawyers whose names had not been identified with the development or practice of international law. Fewer than six of the essays were identified as written by teachers of law. A half dozen of the essays were written by lawyers who are recognized authorities in the field of international and comparative law.

Under the terms of Judge Ross' will as construed by the Probate Court in Los Angeles, only one prize, amounting now to $3,000, is awarded each year. The identity of the competitors is not known to the Committee of Award or to the Board of Governors until after the prize has been voted. The Committee of Award does not attempt to rate or grade essays beyond the one recommended for the prize. Many of the other essays were stated to possess great merit and timeliness of constructive suggestions, so as to be well worthy of publication. Unfortunately, space cannot be found in our columns for more than two essays, in addition to the winning essay which appears in this issue.

A critical survey and analysis of all of the submitted essays would disclose a great deal of independent thinking and a wealth of constructive suggestions which might be helpful in the formation of an American policy of self-defense for this hemisphere. However, such a winnowing of the rich material at hand is not feasible at this time. W. L. R.

BAR ASSOCIATION NEWS

State Bar of Arizona

THE Annual Meeting of the State Bar of Arizona was held at Phoenix, on April 25th, and was well attended.

The meeting was opened by an address of welcome by Governor Sidney P. Osborn of Arizona. Mr. Whitney R. Harris, of the Los Angeles Bar, President of the Junior Barristers of Los Angeles, was one of the principal speakers.

John C. Haynes
President State Bar
of Arizona

The Junior Bar Conference held a round table discussion, presided over by Phil J. Munch, State Chairman for Arizona.

The annual banquet was presided over by Mr. Lawrence L. Howe, retiring president. Mr. Lloyd Wright, President of the State Bar of California, delivered the principal address.

The officers for 1941-42 are: President, John C. Haynes, Tucson; Vice-Presidents, Alfred B. Carr, Prescott, and Edward W. Rice, Globe; Secretary, James E. Nelson, Phoenix.

Federal Bar Association

THE 21st annual meeting and dinner of the Federal Bar Association was held in Washington, D. C., May 5, 1941. The meeting was presided over by President Heber H. Rice, who delivered a report on the activities of the Association during the past year. The guest speaker was Congressman Robert N. Ramspeck, Chairman, Civil Service Committee, House of Representatives, who spoke on the subject of retirement legislation. The Association received twenty committee reports.

Officers unanimously elected for the year 1940-41, were: President, William E. Reese, General Accounting Office; Vice Presidents, Robert N. Anderson, Department of Justice, Marguerite Rawalt, Bureau of Internal Revenue, Wilbur N. Baughman, Federal Trade Commission, and Bernard F. Burdick, Panama Canal Office; Editor, Federal Bar Association Journal, Bernard F. Burdick;

William E. Reese
President, Federal Bar
Association

Delegate, American Bar Association Meeting, William R. Vallance, Department of State; Secretary, David S. Davison, Civil Service Commission; Financial Secretary, W. F. Thompson, Federal Loan Agency; Treasurer, Edward R. Hicks, Securities and Exchange Commission.

Kentucky State Bar Association

THE 1941 Annual Meeting of the Kentucky State Bar Association was held at Louisville, on April 2, 3 and 4. More than 700 lawyers from all sections of the state were in attendance and the interest shown in the sessions of the convention was proved by the fact that more than 250 members were present at each session

L. B. Alexander
President, Kentucky State
Bar Association

Judge John B. Rodes, of Bowling Green, retiring President, presided. Judge Will H. Fulton, of the Kentucky Court of Appeals, discussed "Problems in Opinion Writing." Mr. John L. Vest, of Walton, Kentucky, delivered an address on "Kentucky Lawyers, Past, Present and Future." Mr. E. H. Frye, of the Detroit, Michigan, Bar, spoke on "Streamlining the Practice of Law." Mr. Thomas A. Ballatine, of Louisville, discussed "Pre-Trial Conferences."

At the banquet short addresses were made by Federal Judges H.

Church Ford, Shackleford Miller, Jr., and Mac Swinford. Governor Keen Johnson of Kentucky also spoke. Mr. George M. Morris, of Washington, D. C., a past chairman of the ABA House of Delegates, also spoke at the banquet.

Officers for the year 1941-42 are: President, L. B. Alexander, Paducah; Vice-Presidents, Edward A. Dodd, Louisville, and William B. Gess, Lexington; Secretary, Samuel M. Rosenstein, Frankfort; Registrar-Treasurer, C. Hill Cheshire, Frankfort.

Law and Philosophy

ROSCOE POUND, former Dean of the Law School of Harvard University, gave a series of four lectures at the University of Indiana, under the auspices of the Department of Philosophy, in connection with the so-called Mahlon Powell Foundation.

The general topic was "Social Control Through Politically Organized Society." The titles of the various lectures were:

1. Civilization and Social Control
2. What is Law?
3. The Task of Law
4. The Problem of Values

This is the sixth year in which the series of lectures on the above named foundation have been held.

Marcellus DeVaughn
President, Cleveland
Bar Association

Section Publishes Book

THE proceedings of the September 1940 meeting of the Section of Real Property, Probate and Trust Law have been available for some time to members of this Section. Because of enthusiastic response which it has occasioned among members of the Section due to the wealth of material which it contains and its far-reaching scope and appeal, it is believed this book will be of value to lawyers outside the membership of this particular Section.

It is full of articles and reports on significant, controversial, and timely subjects such as the problems of administrative procedure, state and federal taxation, double taxation of the intangibles of decedents, the legal aspects of going businesses as trust investments—also of bonds, stocks, real property, and mortgages as trust investments—guardianship administration, legislation concerning personal suretyship for guardians, pending trust legislation, recent trust and estate decisions. This book may well be on the shelves of every general practitioner.

Copies are procurable from the Headquarters Office, 1140 North Dearborn Street, Chicago, Illinois, at the price of 50c.

HAROLD L. REEVE, *Chairman*

Lawyer Reference Plan

From Chicago Bar Association Record, May, 1941

"UNDER the Lawyer Reference Plan of the Chicago Bar Association, persons inquiring at the Association's offices for legal assistance are referred to lawyers whose names are taken in rotation from rosters established by the Association. Each prospective client becomes the client of a particular lawyer and pays him for the legal service rendered.

The work of interviewing applicant lawyers will continue as a regular function of the Committee. Although considerable publicity was given to the Plan in the Chicago press and in bar journals upon its inception and upon publication of its first report, there has been little additional publicity. It was mentioned in one radio broadcast describing the work of the Chicago Bar Association. Ways and means of telling more people about the service available under the Plan are being considered.

Although the volume of the Plan is not large it is well worth while. Inasmuch as lawyers in other cities often inquire whether there is much opposition to the Plan, it may be well to state that no adverse criticism of any sort has come to the attention of the Committee during the year. On the contrary, we have had numerous favorable comments from clients, lawyers and laymen. Our experiment has come to be regarded as one of the regular activities of the Chicago Bar Association."

Law Graduates' Interests

R. Allan Stephens, secretary of the Illinois State Bar Association, recently found out what interests law students most when he submitted a list of subjects for discussion to a group at the Law School of the University of Illinois. Top favorite in the list was:

"How Will I Build Up a Law Practice?" Second in the list was: "How Should I Begin to Practice; Alone, in Partnership or as a Law Clerk?"

O. E. Wyckoff
President, West Virginia
Bar Association

JUNIOR BAR NOTES

THE NATIONAL officers of the Junior Bar Conference met at Detroit on May 18, 1941. Steps to avert the usual summer slackening of Association activities were considered at this meeting which was attended by Chairman Lewis F. Powell, Jr., Richmond, Vice-Chairman Philip H. Lewis, Topeka, National Director of Public Information, Paul F. Hannah, Washington, D. C., James A. Gleason, Cleveland, Ohio, Chairman of Indianapolis Program Committee, Willett N. Gorham, Chicago, National Membership Chairman and the Secretary. Greater emphasis is to be placed on the speaking programs sponsored through the Public Information Directors which now total over four hundred speakers.

Junior Bar leaders from Ohio, Kentucky, Michigan, Indiana and Illinois met at the Detroit conference and reported on their activities for the current year. Plans for greater cooperation between the Conference and the state and local units representing the younger members of the bar were thoroughly considered.

Minneapolis Conference

The Radisson Hotel in Minneapolis was the meeting place on May 21, 1941, for the regional meeting of executives of junior bar groups in the states of Wisconsin, Iowa, North Dakota, South Dakota and Minnesota. Vice Chairman Lewis carried on the effective work of selling the Conference to those assembled. The leaders expressed apprehension over securing full cooperation in their states because of the fact that most of the legal population is so widely scattered among the many small cities and villages. Attention was focused on the discussion of the ways and means available to increase activity under the Public Information Program.

Kansas Conference

On May 23, Topeka, Kansas, served as host to the younger lawyer's representatives from the States of Nebraska, Missouri, Oklahoma and Kansas. This was the final regional meeting scheduled for the 1941 season which has been considered unusually successful. Vice Chairman Lewis again placed the Conference program before the group. He was assisted by John W. Oliver, Kansas City, Missouri, and James D. Fellers, Oklahoma City, Oklahoma, Council members from the 8th and 10th Federal Judicial Circuits. The discussion concerning the proper place of national, state and local junior groups in bar association activities was thoroughly enjoyed by all. The future of the wholly independent State Junior Bar Conference received special attention.

Oklahoma Small Loan Act

The Oklahoma delegation at the Kansas City Regional Meeting demonstrated their claim to outstanding activity in the small loan field. The recognition given to the Oklahoma Junior Bar Conference by the Governor and newspapers of that state was well earned. Governor Leon C. Phillips said the activity was commendable, in that it showed a willingness to do a public service without remuneration.

Similar activities are under way in Kansas and South Carolina under supervision of the Committee in Aid of the Small Litigant. Earl F. Morris, Columbus, Ohio, Chairman of the Committee, reports substantial progress being made in these states.

Public Information Program

Plans for more effective activity in the field of the Public Information Program have been receiving a great deal of attention. The number of local directors has been increased by seven hundred forty-seven acceptances of new appointments made within the last month by Chairman Powell. Several more new appointments are expected to round out the coverage in states which are not completely organized. The success of the program is so entirely dependent upon the individual efforts of these local directors that it is well at this time to quote at length from a letter received by Director Paul F. Hannah from Erle Pettus Jr., Birmingham, Alabama:

> "Since I have been on active duty as a reserve officer I am daily reminded of the defense requirements of the country for supplies of all kinds—planes, ships and munitions. It occurs to me that this situation furnishes an opportunity for the Junior Bar through the Public Information Program to perform a real service by arousing Americans to the necessity for accelerated production. To present this need as it should be done will require more work on the part of those taking part in the Program than any previous undertaking, but for such an object I believe it would be gladly done."

Julius Birge, State Chairman for Indiana, and James K. Northam, State Director of Public Information, both of Indianapolis, announce the commencement on May 16 of a weekly radio series over Station WFBM at 5:00 P.M. on the topic "Civilian Defense." The Executive Council has received a request from the North Carolina Public Information Directors for permission to offer their services to the Federal Government as speakers in connection with the new federal financing of six and one half billion dollars. A mail ballot has been requested. Up to the present time the trend is in favor of granting the permission although all the votes have not been cast. There is some feeling that this permission should be given to the Directors in all states and if this prevails there will be an additional extension of the topics covered by the program.

JAMES P. ECONOMOS,
Secretary.

NOTICE OF ELECTION OF STATE DELEGATES IN 1941

THE BOARD OF ELECTIONS met on May 3, 1941, and announced that, in accordance with Article V, Section 5, of the Constitution, there had been the following nominations for the office of State Delegate to be elected in 1941 for a three-year term beginning at the adjournment of the 1941 Annual Meeting. The states indicated with an asterisk will hold an election for the three-year term and for vacancies in the term which will expire at the adjournment of the 1941 Annual Meeting:

States Holding Election	*Nominees*			*Petition Published*
Alabama	William Logan Martin	Birmingham		April
California	Guy Richards Crump	Los Angeles		May
Florida	Cody Fowler	Tampa		May
	Martin H. Long	Jacksonville		June
	Raymer F. Maguire	Orlando		April
Hawaii	(No petition filed)			
Kansas	W. E. Stanley	Wichita		April
Kentucky	Blakey Helm	Louisville		May
Massachusetts*	Joseph N. Welch	Boston	(Vacancy)	March
	Joseph F. O'Connell	Boston	(3 Year Term)	May
	Joseph N. Welch	Boston	(3 Year Term)	March
Missouri	Ronald J. Foulis	St. Louis		May
	Charles M. Hay	St. Louis		May
	Kenneth Teasdale	St. Louis		April
New Mexico*	(No petition filed for the vacancy or 3 year term)			
North Carolina	Francis E. Winslow	Rocky Mount		June
North Dakota*	(No petition filed for the vacancy)			
	Harrison A. Bronson	Grand Forks	(3 Year Term)	May
Pennsylvania	Bernard J. Myers	Lancaster		April
Tennessee*	Mitchell Long	Knoxville	(Vacancy)	June
	George H. Armistead, Jr.	Nashville	(3 Year Term)	May
Vermont*	Olin M. Jeffords	Rutland	(Vacancy)	May
	Deane C. Davis	Montpelier	(3 Year Term)	May
Virginia	Thomas B. Gay	Richmond		March
Wisconsin	Ray B. Graves	Wisconsin Rapids		June
Territorial Group*	(No petition filed for the vacancy)			
	L. Dean Lockwood	Manila, P. I.	(3 Year Term)	June

The following nomination was received to fill a vacancy in the office of State Delegate in which the term expires at the adjournment of the 1942 Annual Meeting:

Illinois	R. Allan Stephens	Springfield	May

Arrangements have been completed for the distribution of the ballots, in accordance with the Constitution, and these to be counted must be received by the Board of Elections at the headquarters of the American Bar Association before the close of business at 5:00 P.M. on June 20, 1941, with the exception of the ballots voted by members accredited to the Territorial Group. Ballots from members in the Territorial Group must be received before the close of business at 5:00 P.M. on July 18, 1941.

It will be observed that there are no nominees in two of the jurisdictions voting, and there are contests for the office of State Delegate in Florida, Massachusetts and Missouri. In all jurisdictions a vote may be cast for someone other than a nominee, whose name appears on the ballot, by writing in a name in the blank space provided and placing X in the square opposite. Ballots to be used in the elections to fill vacancies are printed on yellow paper; those to be used in elections for the regular three-year term are printed on white paper.

ONLY MEMBERS WHO HAVE PAID THEIR DUES FOR THE CURRENT YEAR WILL RECEIVE BALLOTS AS THEY ARE THE ONLY ONES IN GOOD STANDING AND THEREFORE ENTITLED TO VOTE.

Members in Military Service, because of a change in address, may not receive a ballot for the jurisdiction to which they are normally accredited. If they fail to receive a ballot, they are requested to write promptly to the Association office in Chicago and one will be forwarded.

The nominating petitions not heretofore published appear below.

BOARD OF ELECTIONS
Edward T. Fairchild, Chairman

Notice by The Board of Elections

In the interest of conserving space in the Journal, the names of not more than fifty signers to any nominating petition are being published.

Florida

To the Board of Elections:

THE undersigned hereby nominate Martin H. Long, of Jacksonville, for the office of State Delegate for and from the State of Florida:

Messrs. Judson Freeman, W. A. Hamilton, Jr., Edwin M. Clarke, Walter F. Rogers, Reuben Ragland, Julian E. Fant, Edward W. Lane, Jr., J. W. Shands, Wm. H. Rogers, C. D. Towers, Cecil C. Bailey, Burton Barrs, C. D. Rinehart, Herman Ulmer, Ray W. Richardson, Frank Dean Boggs, Harry W. Reinstine, Sam R. Marks, Russell L. Frink, Lee Guest, John W. Ball, Herbert Lamson, Wayne H. Perrine, Leo P. Kitchen, Lawrence Page Haddock, and Marie C. Broetzman, of Jacksonville.

North Carolina

To the Board of Elections:

THE undersigned hereby nominate Francis E. Winslow of Rocky Mount for the office of State Delegate for and from the State of North Carolina:

Messrs. J. G. Adams, Jr., Kingsland Van Winkle, Thomas J. Harkins, R. R. Williams, J. Y. Jordan, Jr., J. M. Horner, Jr., J. G. Merrimon, J. G. Adams, Fred W. Thomas, D. Ralph Millard, and L. Eugene Biddix, of Asheville;

Messrs. C. W. Tillett, P. C. Whitlock, William A. Mason, B. Irvin Boyle, and Frank H. Kennedy, of Charlotte;

Messrs. James MacClamroch, Franklin S. Clark, Kenneth M. Brim, D. E. Hudgins, Beverly C. Moore, J. T. Carruthers, Jr., Charles A. Hines, W. H. Holderness, Charles T. Boyd, and William M. York, of Greensboro; and

Mr. Thomas W. Sprinkle, of High Point.

Tennessee

To the Board of Elections:

THE undersigned hereby nominate Mitchell Long, of Knoxville, for the office of State Delegate for and from the State of Tennessee for the balance of the term to expire at the adjournment of the 1941 Annual Meeting:

Messrs. C. W. K. Meacham, W. D. Moon, Aubrey F. Folts, William G. Brown, Lavens M. Thomas, J. F. Finlay, Jere T. Tipton, Phil B. Whitaker, and Joe V. Williams, of Chattanooga;

Messrs. William P. Moss, Chas. L. Hancock, Keith Short, William Culver White, Thomas Lamar Spragins, Claire B. Newman, W. N. Key, C. E. Pigford, and W. G. Timberlake, of Jackson;

Messrs. Robert L. Taylor, M. A. Ross, J. R. Simmonds, J. H. Winston, W. F. Guinn, and John Goodin, of Johnson City;

Messrs. Walter Chandler, W. P. Armstrong, A. L. Heiskell, John S. Montedonico, Hugh Stanton, Robert A. Hoffmann, L. D. Bejach, John W. Gibson, Harold S. Leeker, Emmett W. Braden, John S. Porter, Chas. M. Bryan, J. W. Canada, Edward P. Russell, James J. Pleasants, Jr., John W. Exby, Henry W. Dunivant, Jno. W. Loch, W. G. Boone, Jos. M. Bearman, Millsaps Fitzhugh, John C. Adams, J. S. Allen, J. E. McCadden, Marion G. Evans, and Wm. W. Goodman, of Memphis.

Territorial Group

To the Board of Elections:

THE undersigned hereby nominate Mr. L. D. Lockwood, of Manila, P. I., for the office of State Delegate for and from the Territorial Group:

Messrs. Jose C. Abreu, Ramon Avancena, Manuel Camus, Francisco A. Delgado, Clyde A. DeWitt, Vicente J. Francisco, Frank W. Brady, Allison J. Gibbs, George R. Harvey, John W. Haussermann, Gabriel La O, Jose P. Laurel, Manuel Lim, John R. McFie, Jr., B. S. Ohnick, A. M. Opisso, Francisco Ortigas, Jr., E. A. Perkins, Claro M. Recto, Eulogio P. Revilla, James M. Ross, Jose A. Santos, Ewald E. Selph, James C. Vickers, and J. A. Wolfson, of Manila; and

Mr. Pedro Tuason of Quezon City, P. I.

Wisconsin

To the Board of Elections:

THE undersigned hereby nominate Ray B. Graves, of Wisconsin Rapids, for the office of State Delegate for and from the State of Wisconsin:

Messrs. Otto A. Oestreich, M. O. Mouat, Roger G. Cunningham, Pierpont J. E. Wood, Sidney J. Thronsen, W. H. Dougherty, John H. Matheson, Robert J. Cunningham, Stanley M. Ryan, Thomas S. Nolan, George S. Geffs, Paul N. Grubb, and Robert E. Lange, of Janesville;

Messrs. Walter W. Hammond, Chester D. Richardson, Richard P. Cavanagh, Roy S. Stephenson, and Ernest E. Jones, of Kenosha;

Messrs. R. M. Rieser, Byron H. Stebbins, Arthur A. McLeod, Edward T. Fairchild, E. J. B. Schubring, Arnold R. Peterson, and William Ryan, of Madison;

Messrs. Carl B. Rix, Reginald I. Kenney, Albert B. Houghton, F. X. Swietlik, G. Carl Kuelthau, Leon E. Kaumheimer, William Doll, Nathan Pereles, Jr., Paul R. Newcomb, J. G. Hardgrove, Arthur W. Fairchild, Claude J. Hendriks, Theodore C. Bolliger, Burt Vandervelde, and Rudolph A. Schoenecker, of Milwaukee; and

Messrs. Claire B. Bird, Fred W. Genrich, Miles Lambert, and Geo. L. Ruder, of Wausau.

California Unfair Practices Act and Fair Trade Act

The following letter is in response to the article on the above topic in the April Journal. It presents a different point of view.

Los Angeles, California
May 1, 1941

Dear Mr. Editor:

In the April issue of the AMERICAN BAR ASSOCIATION JOURNAL there appears an article by Honorable Emmet H. Wilson, Judge of the Los Angeles Superior Court, on the subject of "California Unfair Practices Act and Fair Trade Act." This article represents an interpretation of the law open to serious question.

The Superior Court cases cited in the article are, with one or two possible exceptions, decisions rendered in applications for preliminary injunctions before Judge Wilson, and represent his interpretation of the law without the benefit of a trial on the merits. In some instances the cases cited are awaiting trial on the merits.

The article ignores some grave constitutional questions which are created by the amendments to the Unfair Practices Act made in 1937 and 1939. The 1937 and 1939 amendments to the Unfair Practices Act have changed the Act very materially from that construed in the case of *Wholesale Tobacco Dealers* v. *National Candy Company*, 11 Cal. (2d) 634. However, Judge Wilson states in his article: "The constitutionality of the Unfair Practices Act was sustained," citing the *Wholesale Tobacco Dealers* case.

That statement is true as applied to the 1935 Unfair Practices Act, but the California Supreme Court has not passed upon the constitutionality of the Act as amended in 1937 and 1939. There is considerable evidence that those amendments have resulted in enforcing a considerable degree of price-fixing, have tended to raise prices, have tended to centralize business and create monopolies, and have prescribed an arbitrary and non-judicial system of enforcement at the suit of "any person" whether or not interested, through the medium of mandatory preliminary injunctions. The Unfair Practices Act is no longer directed primarily to prevent practices intended to injure competitors. In any case of a sale at a loss, including pro rata of overhead, or in the case of the making of any gift, however small, including coupons, etc., an intent to injure or destroy competitors is now "presumed" by the law. The effect is to outlaw any gift or price cutting regardless of intent to injure or destroy competitors and is therefore a price-fixing, monopoly-creating law.

Judge Wilson has taken the view, in one case, that "if the result of this decision" (to grant a temporary injunction against a long established business practice as an alleged price cut) "be to damage or even to destroy the business of others, the consequence may be attributed to the incursion of the law into new fields and to the extension of the police power increasingly in the regulation of the conduct of private affairs."

Whether or not a business can thus be damaged or destroyed on preliminary restraining orders and injunctions, issued without a trial, or even on injunction granted after a trial, without violating constitutional guaranties, is a question not yet determined by our Supreme Court.

Since the enforcement of the Unfair Practices Act in Los Angeles County by actions brought by the Food and Grocery Bureau, Inc., under the provisions of the 1939 amendments to the Unfair Practices Act, the failures in the grocery business in Los Angeles County have multiplied by about 2⅓ times, according to a survey of official records, made by Mr. John D. Beyer, M.A. (Harvard University) despite the decrease in failures generally. This destruction of business and property gives cause for alarm, and raises serious ques-

tions as to constitutionality of such legislation.

The totalitarian nature of the present Unfair Practices Act is indicated in Judge Wilson's article, where he discusses the 1939 amendment.

* * * *

The current statute has, therefore, become not a law to be administered by courts according to equitable principles, but has made of the court merely an administrative officer, who *must* issue preliminary injunctions and restraining orders at the request of *any* person, regardless of equitable considerations, and regardless of the destruction of the defendant's business. The constitutionality of this provision has not yet been passed upon.

Judge Wilson also argues, on page 250, in favor of an injunction that "if a preliminary injunction is granted it can do no more than prevent unlawful trade practices, and the defendant will not be restrained from doing anything which the law permits."

This statement overlooks the fact that injunctions are sometimes granted respecting trade practices ancient in character, and which are sometimes the basis of the entire business enjoined, the validity of which is the entire subject of the litigation. The granting of preliminary injunctions without a trial in such cases may involve the destruction of the entire business and property of a defendant on the application of any busybody, *before trial,* and begs the entire question at issue in the litigation. In 90% of the cases, a preliminary injunction has resulted in termination of the litigation. A business often cannot survive such an order, particularly if the business is small and cannot afford the expense of prolonged litigation, and when the defendant is, in effect, presumed to be guilty until proven innocent.

The author's statement above quoted also overlooks the case of *Johnson* v. *Farmer,* 107 Pac. 959, in which the District Court of Appeals held that such temporary injunctions framed in the language of the Unfair Practices statute are invalid. That court said:

"The appellants' next contention, that the judgment is void for uncertainty, must also be sustained. By its terms the judgment decrees that the appellants shall be enjoined from violating the Unfair Practice Act generally, with a further order that they shall not sell at prices less than the scale figures designated upon exhibit 1. The first provision, enjoining them from violating the act, is entirely too broad. As was said in *Rust* v. *Griggs,* 172 Tenn. 565, 113 S.W.2d 733, 738: 'He should not, however, be enjoined in general terms from violating the act in the future in every particular, for that would, as pointed out by the Supreme Court, compel defendant to conduct all his business under the jeopardy of punishment for violating a general injunction and violative of elementary principles of justice.' "

A hearing of this case was denied by the California Supreme Court. Thus our Supreme Court has not approved the practice of putting the defendant at his peril to determine what is and what is not a violation of the act, and imposing the penalty of punishment for contempt in addition to the penal provisions of the statute.

In considering the subject of these acts, we are talking about a transition from a system of free enterprise and a system of democratic government to a system of totalitarian economics and totalitarian government, with price fixing and arbitrary enforcement of the worst and most irresponsible kind. It is far worse than the N. R. A. codes, of which Herbert Hoover has said (in *The Challenge to Liberty,* p. 120): "There is a conflict between maintaining anti-trust laws and the setting of monopoly under the codes, one result of which is to squeeze out the smaller business and another result is to increase prices and the cost of living and thus to promote strikes to equate wages."

Certainly everything Mr. Hoover said has proven true of these acts.

I think that the side of free enterprise ought to be presented in the pages of the AMERICAN BAR ASSOCIATION JOURNAL.

Very truly yours,

LUCIUS F. CHASE.

Another State Enacts C.S.R. Law

The recent session of the Kansas legislature passed a *Certified Shorthand Reporters* law, under which it is made the duty of the Supreme Court, under such rules as it may deem necessary, "and in substantially the same manner as attorneys at law are licensed to practice law, to grant certificates of eligibility for appointment as official reporters of the District Courts." New York, Iowa, Colorado, and New Jersey also have C.S.R. laws, the purpose of which is to secure competent practitioners of a profession which is a necessary part of present-day court procedure. The NATIONAL SHORTHAND REPORTERS ASSOCIATION for many years has endorsed such legislation.

Louis Goldstein,
Secretary,
150 Nassau St.,
New York City.

TO OUR READERS

When writing to our advertisers, please mention the JOURNAL. Thanks.

• CLASSIFIED •

BOOKS

FOR SALE: NORTHWESTERN REPORTER 292 volumes—all buckram $425.00. Law Books bought, sold and exchanged. JOHN R. MARA, 2709 Lucas Drive, Dallas, Texas.

OLD DEEDS, ESTATE PAPERS, SALE BILLS up to 1875 wanted. All states. BALDWIN'S BOOK SHOP, 924 Shipley Street, Wilmington, Del.

APPELLATE BRIEFS AND RECORDS.—Indentures, Registration Statements,—Corporate Reports and Notices to Shareholders—no finer service in the United States. The GATES LEGAL PUBLISHING COMPANY, 410 Blackstone Bldg., Cleveland, Ohio.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. Clark Boardman Co., Ltd., 11 Park Place, New York City.

FOR SALE: PACIFIC, NORTHWESTERN, Northeastern, Southwestern, Federal Reporters, U. S. Reports, Pacific States Reports, Amer. Digest System, Amer. Law Reports. All fine buckram and complete. Also other sets. R. V. BOYLE, Colcord Bldg., Oklahoma City, Okla.

COURT REPORTS, — LAWS, — TEXTS, Attorney general and bar reports, law journals. Lists free. ORION BOOK SERVICE, Fort Smith, Ark.

USED LAW BOOKS OF EVERY DESCRIPtion—Bought and sold. JOSEPH MITCHELL, 5738 Thomas Ave., Philadelphia, Pennsylvania.

LAW BOOKS — EXCEPTIONAL PRICES. Complete assortment, sets and texts. Law libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSN., 538 S. Dearborn St., Chicago, Ill.

LARGE LIBRARY INCLUDING FEDERAL, many state reports and texts. Send for complete list. THE DEMING INVESTMENT COMPANY, Oswego, Kansas.

RATES

10 cents per word for each insertion; minimum charge $1.20 payable in advance. *Copy should reach us by the 15th of the month preceding month of issue.*

HIGHEST CASH PRICES PAID FOR ACTS and laws. Pamphlets on all subjects. JAMES LEWIS HOOK, 13 Snowden Road, Bala-Cynwyd, Pa.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St. N. W., Washington, D. C.

LAW OFFICE ORGANIZATION BY REGInald Heber Smith. A complete book on necessary essentials for all attorneys. Reprint of four articles from May, June, July, August, 1940 issues. Price 25c. A. B. A. JOURNAL, 1140 North Dearborn St., Chicago.

ROBES

JUDICIAL ROBES — CUSTOM TAILORED, the best of their kind—satisfaction guaranteed —Catalog No. 41 sent on request. MCCARTHY & SIMON, INC., 7 W. 36 St., New York, N. Y.

JUDICIAL ROBES — PRICES MEETING your budget. Leaflet mailed. LINDNER, 425 AB. Seventh Ave., New York City.

RESORTS

SKY MEADOWS RANCH — THE TRUE West. Modern for your comfort—Western for your enjoyment — Excellent cuisine — Accommodations limited; catering to A B A members. Write, SKY MEADOWS RANCH—Encampment, Wyoming.

POSITIONS WANTED

LAW LIBRARY, LAW EDITORIAL OR research position desired, Expert Legal Bibliographer. Writer, compiler, editor for many standard law publications. Teach legal bibliography, research, briefing, etc. University law degree. Admitted. Single. Write Post Office Box 11, London Bridge, Virginia.

MISCELLANEOUS

APPRAISALS AND LIQUIDATIONS ANtique and modern furnishings anywhere in United States, single items or entire collections and estates. Highest references. W. TORREY LITTLE, Auctioneer and Appraiser, Marshfield Hills, Mass.

DEPOSITIONS IN WASHINGTON, D. C. taken by Burdella E. Scarborough, Notary Public, will be reported with strict conformity to all statutory requirements, by H. S. MIDDLEMISS, Shorthand Reporter, Commissioner, U. S. Court of Claims. 408-10 Columbian Bldg., 'Phone NAtional 2369.

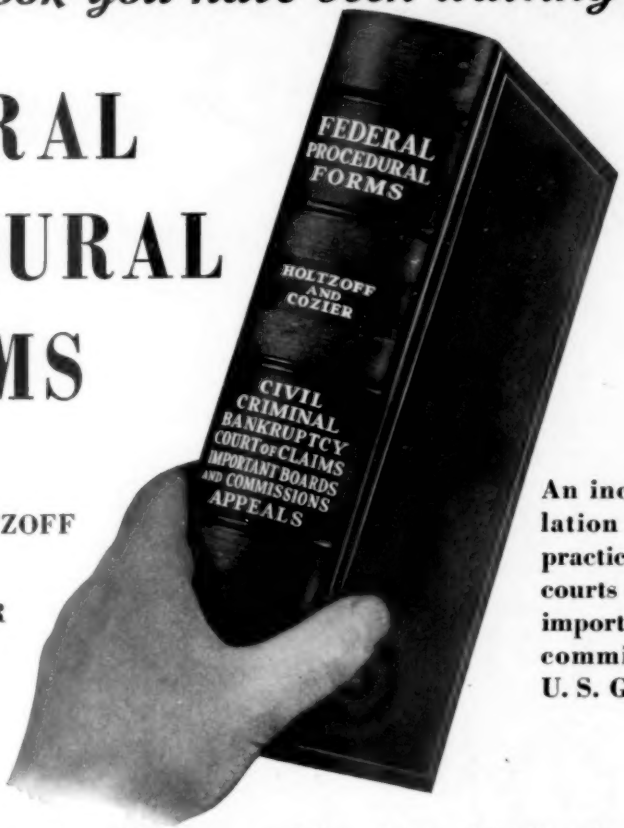
LAWYER'S LEDGER, 823 MUNSEY BLDG., Baltimore, Md. Sample sheet sent if requested.

BINDER FOR THE JOURNAL—LIES FLAT — No hole punching — Buckram back — price $1.50—Please mail check with order. A. B. A. JOURNAL, 1140 N. Dearborn St., Chicago, Ill.

ADMINISTRATIVE LAW SYMPOSIUM — Reprints. Complete informative analysis. 25 cents single copy. A. B. A. JOURNAL, 1140 N. Dearborn St., Chicago, Ill.

Here is the Book you have been waiting for . . . !

FEDERAL PROCEDURAL FORMS



By ALEXANDER HOLTZOFF
Special Assistant to the Attorney General

and ALLEN R. COZIER
Special Attorney in the Department of Justice

An inclusive compilation of forms for practice in all federal courts and before the important boards and commissions of the U. S. Government.

The need for Federal Procedural Forms has been apparent ever since the new rules went into effect. The rules attempted to insert brevity and simplicity in federal practice. As a result, many forms used prior to September, 1938, became largely obsolete and many others needed complete revision.

Federal Procedural Forms answers this need by presenting:

1. Complete and authoritative forms for every type of practice in the District Courts of the United States.

2. Forms for Appeals to Circuit Court of Appeals and U. S. Supreme Court.

3. Forms for practice before the important Boards and Commissions of the U. S. Government and for appeals from such bodies to the Courts.

4. Annotations and cross-references to statutes and to the rules pertinent to such forms, together with notes containing helpful information as to pleading and practice.

IMPORTANT NOTE

In states where new procedural rules have been adopted which conform to the new federal rules, this book can be used for local practice as well as federal practice. All the attorney has to do is change the caption of the form and change any federal court reference in the body of the form to his state court. Then the forms contained in this book can be just as useful for his state practice as for federal courts.

Complete in One Handsome Volume Containing More than 1000 Up-to-Date Forms...Price $15.00

THE BOBBS-MERRILL COMPANY • PUBLISHERS • INDIANAPOLIS

YOUR CASE IS THERE

Every case you have ever argued in an Appellate Court is cited in the Corpus Juris System and has contributed its share to the development of our jurisprudence.

Every case you will ever argue in the future will be cited in the supplemental service to this system.

BECAUSE

The Corpus Juris System (C.J. - C.J.S.) states all the law and cites all reported cases.

THE AMERICAN LAW BOOK COMPANY

Brooklyn, New York

Publishers of

Corpus Juris and Corpus Juris Secundum